# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. 633 [redacted] 16

EDGAR S. APPLEBY AND JOHN S. APPLEBY, PLAINTIFFS IN ERROR,

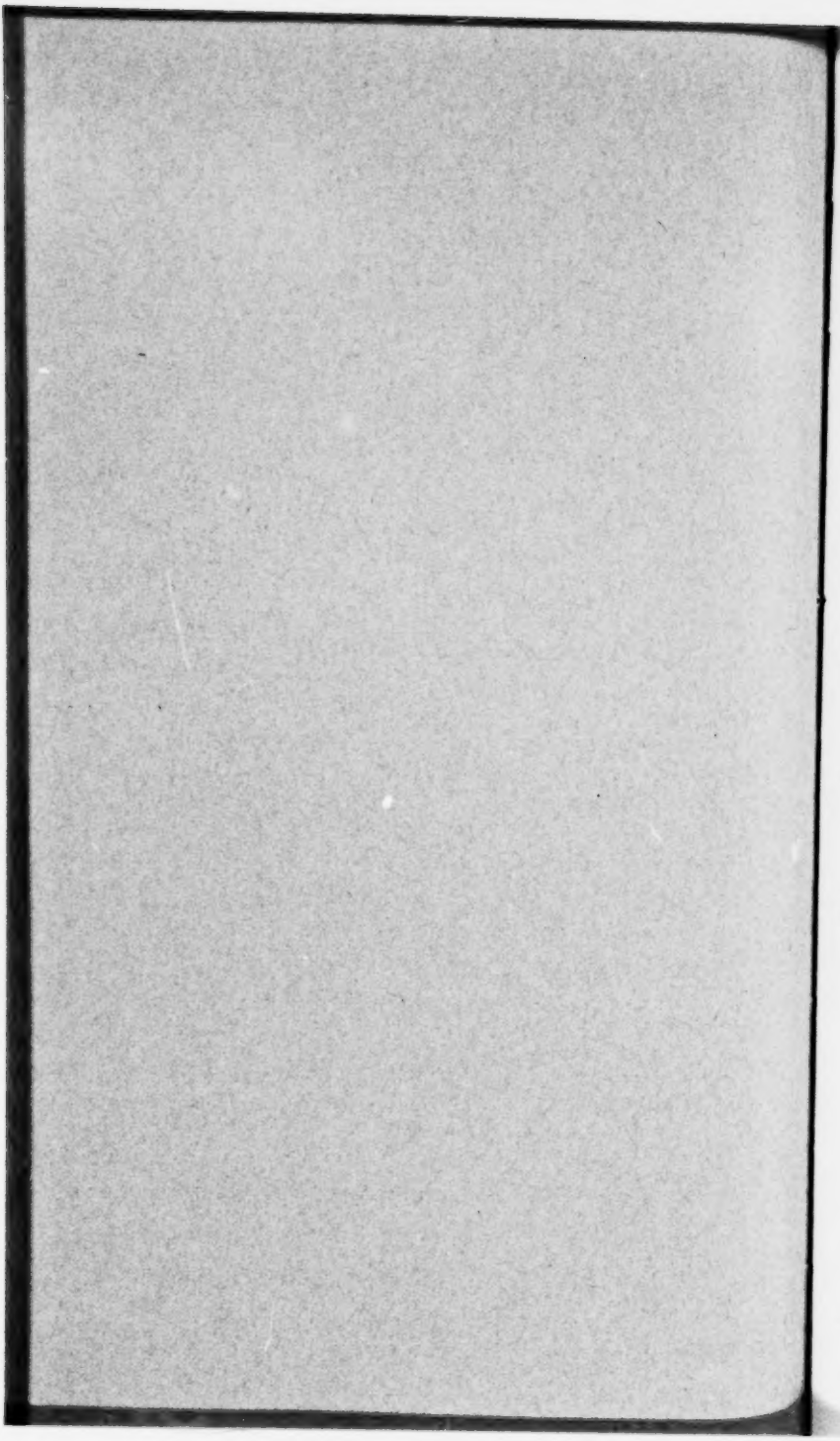
*vs.*

JOHN T. DELANEY, AS COMMISSIONER OF DOCKS OF THE CITY OF NEW YORK

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

FILED SEPTEMBER 6, 1923

(29,843)



# (29,843)

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1923**

# No. 533

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EDGAR S. APPLEBY AND JOHN S. APPLEBY, PLAINTIFFS IN ERROR,

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

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INDEX



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 1, 1923

AT A SPECIAL TERM, PART II, OF THE

# SUPREME COURT HELD IN AND FOR THE COUNTY OF NEW YORK

AT THE COURT HOUSE, IN SAID COUNTY, ON THE 27TH DAY OF APRIL, 1923

Present: Hon. James O'Malley, Justice.

In the Matter of the Application of EDGAR S. APPLEBY and JOHN S. APPLEBY for a Peremptory Writ of Mandamus, Relators, against JOHN H. DELANEY, as Commissioner of Docks of the City of New York, Defendant.

## ORDER ON REMITTITUR

The defendant in the above-entitled proceeding having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Department, dated the 20th day of January, 1922, and entered and filed in the office of the Clerk of said Appellate Division on or about the 3rd day of March, 1922, as resettled by the order herein, dated the 27th day of April, 1922, and entered and filed in the office of the Clerk of said Appellate Division on or about the same day; and a certified copy thereof, filed in the office of the Clerk of the County of New York on or about the 29th day of April, 1922, which said order grants relators' motion for a peremptory writ of mandamus; and the relators above named having also appealed from the said order of the Appellate Division as resettled aforesaid, in so far as said order limits the relators' right to a peremptory writ of mandamus, unless The City of New York should immediately acquire title to the property of the said relators; and the said appeals having been duly argued at the Court of Appeals, and after due deliberation the said Court of Appeals having, in an order made and dated the 17th day of April, 1923, and entered therein on the 18th day of April, 1923, ordered and adjudged that the order of the Appellate Division of the Supreme Court appealed from herein be reversed, and that of Special Term affirmed, with costs in this Court and in the Appellate Division and having also further ordered that the record therein and the proceedings in said Court be remitted to the said Supreme Court, there to be proceeded upon according to law;

Now, upon reading and filing the said remittitur and on motion of George P. Nicholson, Corporation Counsel, attorney for defendant, it is

Ordered and adjudged that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court; and it is further

Ordered and adjudged that the defendant, John H. Delaney, as Commissioner of Docks of the City of New York, recover of the relators Edgar S. Appleby and John S. Appleby the sum of $246.85, the amount of said defendant's costs as taxed, and that said defendant have execution therefor.

Enter.

J. O'M., J. S. C. James A. Donegan, Clerk.

Dated, New York, May 2d, 1923.

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STATE OF NEW YORK, ss:

COURT OF APPEALS

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany on the 17th day of April in the year of our Lord one thousand nine hundred and twenty-three, before the Judges of said Court.

Witness, The Hon. Frank H. Hiscock, Chief Judge, presiding.

R. M. Barber, Clerk.

REMITTITUR—April 18, 1923

[Title omitted]

Be It Remembered, That on the 22nd day of June, in the year of our Lord one thousand nine hundred and twenty-two Edgar S. Appleby and ano., the relators appellants in this cause, came here unto the Court of Appeals, by Banton Moore, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And John T. Delaney, as Commissioner, etc., the defendant-appellant in said cause, afterwards appeared in said Court of Appeals by John P. O'Brien, his attorney, and also filed a notice of appeal.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Banton Moore, of counsel for the relator-appellants, and by Mr. Charles J. Nehrbas, of counsel for the defendant-appellants, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and that of Special Term affirmed, with costs in this court and in the Appellate Division.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, It is considered that the said order of the Appellate Division be reversed and that of Special Term affirmed, with costs in this court and in the Appellate Division.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. Barber, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office

Albany, April 18, 1923.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

R. M. Barber, Clerk. (Seal of the Court of Appeals.)

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At a Special Term, Part II, of the Supreme Court Held in and for the County of New York at the Court House, in Said County, on the 13th Day of June, 1923

Present: Hon. Richard P. Lydon, Justice.

[Title omitted]

Order on Reargument

The relators-appellants having moved for a reargument of the appeal herein to the Court of Appeals and the said motion having been duly argued at the Court of Appeals, and after due deliberation the said Court of Appeals in an order dated the 5th day of June, 1923 having denied the said motion without costs, now upon reading and filing the said order of the Court of Appeals, it is

Ordered that the said order of the Court of Appeals be and the same hereby is made the order of this Court.

Enter.

(S.) R. P. L., J. S. C.

STATE OF NEW YORK:

IN COURT OF APPEALS

At a Court of Appeals for the State of New York Held at Court of Appeals Hall, in the City of Albany, on the Fifth Day of June, A. D. 1923

Present: Hon. Frank H. Hiscock, Chief Judge, presiding.

[Title omitted]

ORDER ON MOTION FOR REARGUMENT

A motion for a re-argument of the above cause, having been heretofore made upon the part of the relator-appellants herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered that the said motion be and the same hereby is denied without costs.

A copy.

(Sgd.) Wm. J. Armstrong, Deputy Clerk. (Seal.)

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**Notice of Appeal.**

# Supreme Court,

NEW YORK COUNTY.

2

In the Matter

*of*

The Application of Edgar S. Appleby and John S. Appleby, for a peremptory writ of mandamus

*against*

Murray Hulbert, as Commissioner of Docks of The City of New York.

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Sirs:

Please take notice that the above named Edgar S. Appleby and John S. Appleby hereby appeal to the Appellate Division of the New York Supreme Court in and for the First Department, from the order herein entered and filed in the office of the Clerk of New York County on or about the 29th day of December, 1920, denying the application of Edgar S. Appleby and John S. Appleby for a peremptory writ of mandamus herein,

4 *Notice of Appeal.*

and the said appellants appeal from each and every part of said order, as well as the whole thereof.

Dated, New York, January 27, 1921.

Yours, &c.,
BANTON MOORE,
Attorney for Appellants,
110 William Street,
Borough of Manhattan,
City of New York.

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To:

JOHN P. O'BRIEN, Esq.,
Corporation Counsel.

WILLIAM F. SCHNEIDER, Esq.,
Clerk of the County of New York.

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## Order Appealed From, Denying Application for Mandamus.

At a Special Term, Part I, of the Supreme Court held in and for the County of New York at the County Court House in the Borough of Manhattan, City of New York, on the 11th day of December, 1920.

Present: Hon. Edward R. Finch, Justice.

In the Matter

*of*

The Application of Edgar S. Appleby and John S. Appleby for a peremptory writ of mandamus

*against*

Murray Hulbert, as Commissioner of Docks of the City of New York.

The application of Edgar S. Appleby and John S. Appleby for a peremptory writ of mandamus to be directed to Murray Hulbert as Commissioner of Docks of The City of New York, having duly come on to be heard;

Now, on reading the notice of motion herein, dated May 28, 1920, and the petition of Edgar S. Appleby and John S. Appleby, duly verified May 28, 1920, and the schedules A-J annexed

10 *Order Appealed From—Denying Application.*

thereto, and on reading and filing the affidavit of Murray Hulbert, duly verified June 7, 1920, and the stipulation signed by the attorneys for the respective parties hereto and dated September 20, 1920, and after hearing Banton Moore, Esq., of counsel for the petitioners, in support of said application, and Charles J. Nehrbas, Esq., of counsel for the defendant Commissioner of Docks in opposition thereto, and due deliberation having been had and on filing the opinion of the Court herein, it is, on motion of John P. O'Brien, Cor-

11 poration Counsel,

ORDERED that the said application be and the same hereby is in all respects denied as a matter of right, and not in the exercise of discretion, with $10 costs.

Enter,

E. R. F.,
J. S. C.

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## Notice of Motion.

SUPREME COURT,

NEW YORK COUNTY.

IN THE MATTER

*of*

The Application of EDGAR S. APPLEBY and JOHN S. APPLEBY for a peremptory writ of mandamus

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*against*

MURRAY HULBERT, as Commissioner of Docks of the City of New York.

*Sir*:

PLEASE TAKE NOTICE that upon the petition of Edgar S. Appleby and John S. Appleby, verified the 28th day of May, 1920, annexed hereto, I shall make a motion at Special Term, Part I, of the New York Supreme Court, to be held in the New York County Court House in the Borough of Manhattan, City of New York, on the 10th day of June, 1920, at 10:15 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for a peremptory writ of mandamus issued out of and under the seal of the Supreme Court, directed to Murray Hulbert as Commissioner of Docks of the City of New York, requiring him forthwith

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16 *Notice of Motion.*

to issue to the petitioners a certificate or written authority, permitting them to improve their property mentioned and described in the petition as and in the manner set forth in the petition and for such other and further relief as may be just.

Answering affidavits must be served five days before the return day of this motion.

Dated, New York, May 28, 1920.

Yours, &c.,

BANTON MOORE,

17 Atty. for Petitioners,

95 William Street,

Borough of Manhattan,

City of New York.

To:

HON. MURRAY HULBERT,

As Commissioner of Docks of the

City of New York.

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## Petition of Edgar S. Appleby and John S. Appleby Read in Support of Motion.

SUPREME COURT,

NEW YORK COUNTY.

IN THE MATTER

*of*

The Application of EDGAR S. APPLEBY and JOHN S. APPLEBY, for a peremptory writ of mandamus

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*against*

MURRAY HULBERT, as Commissioner of Docks of the City of New York.

*To the Supreme Court of the State of New York:*

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The petition of Edgar S. Appleby and John S. Appleby respectfully shows to this Court and alleges:

(1) That the City of New York is a municipal corporation, and as such is successor to the municipal corporation known as the Mayor, Aldermen and Commonalty of the City of New York, and that Murray Hulbert is Commissioner of Docks of the said City of New York, and is and was the proper officer to whom to make the application hereinafter mentioned.

22 *Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion.*

(2) That Edgar S. Appleby and John S. Appleby hereinafter frequently referred to as the petitioners, are and were on December 5, 1919, the owners in fee simple absolute of the following described premises in the County of New York, Borough of Manhattan, City of New York, to wit:

PARCEL No. 1—ALL that certain piece and parcel of land under water, bounded and described as follows:

23 BEGINNING at a point formed by the intersection of the westerly side of Twelfth Avenue, with the northerly side of West 39th Street, running thence westerly along West 39th Street, 363 feet to the easterly side of Thirteenth Avenue, thence northerly along the easterly side of Twelfth Avenue, 198 feet 2 inches to the southerly side of West 40th Street, thence easterly along the southerly side of West 40th Street 379 feet 2 inches to the westerly side of Twelfth Avenue, thence southerly along the westerly side of Twelfth Avenue, 197 feet 6 inches to the point or place of beginning.

24 PARCEL No. 2. ALL that certain piece and parcel of land under water, bounded and described as follows:—

BEGINNING at a point formed by the westerly side of Twelfth Avenue with the northerly side of West 40th Street, running thence westerly along the northerly side of West 40th Street 384 feet to the easterly side of Thirteenth Avenue, thence northerly along the easterly side of Thirteenth Avenue 198 feet 2 inches to the southerly side of West 41st Street, thence easterly along the southerly side of West 41st Street 400 feet 2 inches to the westerly side of Twelfth Avenue, thence southerly along the westerly side of

*Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion.*

Twelfth Avenue, 197 feet 6 inches to the point or place of beginning.

Together with all manner of wharfage, cranage, advantages and emoluments growing or accruing by or from that part of the exterior line of the said City, lying on the westerly side of Thirteenth Avenue, fronting on the Hudson River, with full power to collect and receive the same for their own proper use and benefit forever, excepting therefrom such wharfage, cranage, advantages and emoluments to grow or accrue from the westerly end of the bulkhead in front of the entire width of the northerly half of 39th Street; the southerly and northerly half of 40th Street and the southerly half of 41st Street, which were reserved by the Mayor, Aldermen and Commonalty of the City of New York, their successors and assigns, with full power to collect and receive the same for their own proper use and benefit forever, as hereinafter set forth.

(3) That said Edgar S. Appleby and John S. Appleby are entitled to fill in and improve the above described premises at their pleasure.

(4) That on or about the 5th day of December, 1919, by application in writing, dated on said date, the said Edgar S. Appleby and John S. Appleby applied to the said Murray Hulbert as Commissioner of Docks as aforesaid for permission to fill in or improve the said premises hereinbefore described, in the manner and method set forth in the plans annexed to said application, which application is attached hereto and made a part hereof as if set forth herein at length and designated as "Schedule A".

(5) That on or about January 31, 1920, the said

*Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion.*

Murray Hulbert, as Commissioner of Docks as aforesaid, denied the said application of the said Edgar S. Appleby and John S. Appleby, by letter of said date, upon the ground, "that the proposed construction is not in accordance with the new plan", and that a copy of the said letter denying said application, is attached hereto and made a part hereof, as if set forth herein at length and designated as "Schedule B".

(6) That the new plan referred to in the said letter of the Commissioner of Docks is the so-called present plan for the improvement of the water front along the North River from 39th to 41st Streets, as amended by resolution of the Commissioner of Docks on July 16, 1916, and approved by the Commissioners of the Sinking Fund in July, 1916, as set forth in detail and shown on the proposed amendment to the amended new plan, dated May 1, 1916, attached hereto and marked "Schedule C", which proposed amendment provides for the discontinuance of the proposed bulkhead lines of the year 1890, and disregards entirely, the other proposed bulkhead lines, and especially the established bulkhead line of 1837, in reference to which petitioners' property rights were granted and fixed as hereinafter set forth.

(7) That the present proposed amendment to the amended new plan, so called, and other proposed or discontinued amendments hereinafter set forth, are and were ineffectual to impair or destroy the petitioners' property and rights or to interfere therewith. And that if the adoption of any of the proposed amendments to the amended new plan, so called be construed as impairing, interfering with or destroying petitioners' prop-

erty or rights they are and were invalid as violating, first, Article I, Section 10, Part 1, of the Constitution of the United States, by impairing the obligation of a contract; second in violation of Articles V and XIV (Section 1) of the additions to and amendments of the Constitution of the United States, and Article I, Section 6, of the Constitution of the State of New York, by depriving the petitioners or their predecessors in title of their property or rights without due process of law and taking their property for public use, without just compensation, as will appear from the following recitals:—

(8) That in and prior to the year 1837, the Manhattan shore of the Hudson River, in the vicinity of the petitioners' premises hereinbefore described was very irregular, and in order that the said water front might be improved with streets and avenues, a map was prepared by George B. Smith, City Surveyor, showing the projected line of the City of New York extending, along the Hudson River from Hammond Street to 135th Street, dated March 10, 1837, an extract of which map is attached hereto and marked "Schedule D".

(9) That on or about the 12th day of April, 1837, The People of the State of New York, represented in Senate and Assembly, duly enacted Chapter 182 of the Laws of 1837, entitled "An Act to establish a permanent exterior street or avenue in the City of New York along the easterly shore of the North or Hudson's River and for other purposes".

(10) Said act was passed the 12th day of April, 1837, and, at all times mentioned herein was, and now is, in full force and effect, insofar as the

right and title of the petitioners to the premises described in paragraph 2 hereof are concerned.

(11) That a copy of Chapter 182 of the Laws of 1837 is attached hereto and made a part hereof, as if set forth herein at length and designated as "Schedule E".

(12) That on or about the 1st day of August, 1853, The Mayor, Aldermen and Commonalty of the City of New York for a valuable consideration and in consideration of certain covenants and agreements mentioned and contained in a certain indenture in writing, duly granted, bargained, sold, aliened, released and conveyed unto one Charles E. Appleby and unto his heirs and assigns forever, all that certain water lot, vacant ground or soil under water to be made land and gained out of the Hudson or North River in the Harbor of New York, bounded and described in said instrument and including the premises hereinbefore described as Parcel No. 1 in paragraph 2 of this petition, which said indenture or deed, marked "Schedule F", is annexed hereto and made a part hereof, as if set forth herein at length.

(13) That the said deed of conveyance to said Charles E. Appleby was duly recorded in the office of the Register of New York County on or about the 3rd day of September, 1853, in Liber 636 of Conveyances, at page 452, and a duplicate or counter part thereof is on record in the Comptroller's office of New York City, in Book 1 of Grants, at page 181.

(14) That on or about the 24th day of December, 1852, the Mayor, Aldermen and Commonalty of the City of New York, for a valuable consideration and in consideration of certain covenants and

*Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion.*

agreements mentioned and contained in a certain deed of conveyance, a copy of which is hereto annexed and marked "Schedule G", duly granted, bargained, sold, aliened, released and conveyed unto Robert Laton and unto his heirs and assigns forever, all that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River in the Harbor of New York, therein bounded and described and including the premises designated as Parcel No. 2 in paragraph 2 of this petition, which said deed of conveyance marked "Schedule G" is annexed hereto and made a part hereof, as if set forth herein at length.

(15) That the said deed of conveyance to said Robert Laton was duly recorded in the office of the Register of New York County on or about the 3rd day of January, 1853, in Liber 623 of Conveyances at Page 170, and a duplicate or counter part thereof is on record in the Comptroller's office of the City of New York in Book 2 of Grants at page 117.

(16) That thereafter and on or about the 12th day of January, 1854, said Robert Laton duly sold and conveyed to the said Charles E. Appleby and unto his heirs and assigns, all of the said premises, rights, privileges and emoluments hereinbefore mentioned, bounded and described and contained in the said deed marked "Schedule G", and which said deed to Appleby was duly recorded in the office of the Register of New York County on the 16th day of June, 1865, in Liber 932 of Conveyances, Page 458.

(17) That said Charles E. Appleby was the sole and continuous owner of the said premises, bounded and described in "Schedules F and G",

together with the rights, privileges and emoluments appertaining thereto from the date of each of said deeds of conveyance to him until the time of his death.

(18) That said Charles E. Appleby died on the 15th day of December, 1913, in the City and County of New York, leaving him surviving his two sons, Edgar S. Appleby and John S. Appleby, the petitioners herein, and no other heirs at law or next of kin. Said Charles E. Appleby left a last
41 Will and Testament, which was duly admitted to probate in the office of the Surrogate of Monmouth County, New Jersey, on or about the 26th day of December, 1913, and an exemplified copy of said last Will and Testament, duly authenticated, was duly filed in the office of the Surrogate of New York County on or about January 23rd, 1914, and in the office of the Clerk of New York County on or about the 24th day of January, 1914, and in and by said last Will and Testament, said Charles E. Appleby devised and bequeathed all of his property, both real and personal to his two sons, the said Edgar S. Appleby and John S.
42 Appleby, the petitioners herein, absolutely and in equal shares.

(19) That since the date of the death of said Charles E. Appleby, the said Edgar S. Appley and John S. Appleby have been the owners in fee of all the said premises hereinbefore described, together with all rights, terms, privileges, wharfage, cranage, dockage and emoluments appertaining or belonging thereto.

(20) Upon information and belief, that the said deeds of conveyances from the Mayor, Aldermen and Commonalty of the City of New York, hereinbefore referred to, were made and accepted

in full faith and reliance upon the provisions of said Chapter 182 of the Laws of 1837, and with full and complete knowledge and understanding of the parties that they were so accepted by the grantees, relying upon the terms, conditions and covenants in said deeds and the provisions of said Chapter 182 of the Laws of 1837. 43

(21) Upon information and belief, that upon the execution and delivery of said deeds of conveyances from the Mayor, Aldermen and Commonalty of the City of New York, the title in fee simple absolute to the lands under water therein described, vested in said grantees, their heirs and assigns, and also the easements of light, air and access in and to the streets and avenues therein and abutting thereon and also certain rights and privileges of wharfage, cranage and dockage, and the sole and exclusive right to build the streets and avenues mentioned in said deeds, and the right to fill in and improve the said premises between the streets and avenues at the pleasure of said grantees, their heirs and assigns, without permission from the Mayor, Aldermen and Commonalty of the City of New York,, its successors in interest, or any department thereof, except of course, any permission of the Dock Department, reasonably required for the purpose of avoiding interference in the prosecution of the work. 44 45

(22) That neither the petitioners nor their predecessors in title, have ever been required to build or erect the streets, wharves or bulkheads referred to in said deeds.

(23) That the petitioners and their predecessors in title have duly acted, done, performed, and complied with, all the articles, terms, covenants and agreements on their part contained in the said

46 *Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion.*

deeds from the Mayor, Aldermen and Commonalty of the City of New York.

(24) That neither the petitioners nor their predecessors in title, except as hereinbefore mentioned have ever parted by deed, agreement, condemnation proceeding or otherwise with any right, title or interest in and to the said premises mentioned and described in said deeds, or any part thereof, or with any rights, privileges, easements or emoluments therein or appurtenant thereto.

47 (25) That under and by virtue of Chapter 137 of the Laws of 1870, passed April 5, 1870, and entitled, "An act to reorganize the local government of the City of New York," as amended by Chapter 574 of the Laws of 1871, passed April 18, 1871, and entitled, "An act to amend an act entitled 'An act to reorganize the local government of the City of New York,' passed April 5, 1870." The Department of Docks of the City of New York was created, the head of which consisted of a board of five persons and said Department of Docks was authorized and directed to determine upon a plan for the improvement of the whole or any part of
48 the water front of the City of New York, said plan to be approved by the Commissioners of the Sinking Fund, and said board of the Department of Docks was authorized to acquire by purchase or condemnation proceedings, in the name and for the benefit of the corporation of the City of New York, any and all property in said City to which the corporation of the City of New York then had no right or title, and any rights, terms, easements and privileges pertaining to said property in said City and not owned by said corporation, necessary to carry said plan into effect when adopted and after the adoption of said plan by the Com-

missioners of the Sinking Fund, said Board of the Department of Docks was directed to lay out, establish and construct wharves, piers, bulkheads, basins, docks and slips in and upon or about the property not owned by the Mayor, Aldermen and Commonalty of the City of New York, without interfering with the property or rights of any other person; but no power or authority whatever was or could be given by said Statute or any other Statutes to the Mayor, Aldermen and Commonalty of the City of New York, or the Board of the Department of Docks, or any other board or department of said City, to establish and construct such wharves, piers, bulkheads, basins, docks or slips in and upon or about the property not owned by the Mayor Aldermen and Commonalty of the City of New York, or otherwise interfere with the same unless and until compensation was made.

(26) That the wharves, piers, bulkheads, basins, docks and slips in the contemplation of said Statutes of 1870 and 1871, were to be built by the Mayor, Aldermen and Commonalty of the City of New York, or the Board of the Department of Docks, or their successors, according to the said plan when duly adopted and after acquiring the property, rights, terms, easements and privileges necessary therefor, and, when constructed, such structures were to be for the sole benefit of the said corporation, or its successors, and by the express terms of said Statute, such structures were not authorized to be built and such plan could not be legally and physically carried into effect, so as to impair or injure vested property rights not owned by said City, unless and until such private property and all rights, terms, easements and privileges pertaining thereto, as were necessary,

proper and desirable for the purpose, were acquired by the corporation, The Mayor, Aldermen and Commonalty of the City of New York, or its successors by voluntary purchase or legal proceedings under the power of eminent domain.

(27) Upon information and belief, that on or about the 27th day of April, 1871, pursuant to the said Statutes of 1870 and 1871, the said Commissioners of the Sinking Fund approved a plan for the improvement of the water front in the North
53 or Hudson River, which plan was theretofore submitted to said commissioners by the said Board of the Department of Docks, and said plan included petitioners' said land under water between Twelfth and Thirteenth Avenues, Thirty-ninth and Fortieth Streets, as shown on said Plan of 1871 annexed hereto as "Schedule H".

(28) Upon information and belief, that in and by said plan a marginal wharf, or so-called street, was laid out and proposed over petitioners' said property. Said proposed marginal wharf, or street, was to be 250 feet wide, and included all of Twelfth Avenue and so much of petitioners'
54 property as lay west of Twelfth Avenue and within a distance of 150 feet westerly therefrom, and it was proposed by said plan that said marginal street or wharf should be the limit of solid filling and that no land under water west of such marginal street should be filled in.

(29) Upon information and belief, that on or about the 11th day of June, 1891, the Mayor, Aldermen and Commonalty of the City of New York instituted a condemnation proceeding to acquire title to the property, rights, terms, easements, privileges and emoluments, etc., hereinbefore referred to in paragraph 2 of this Petition,

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but said condemnation proceeding was never consummated, and when an attempt was made by petitioners and their predecessors in title to consummate said proceeding, the said City of New York the successor to the Mayor, Aldermen and Commonalty of the City of New York, as aforesaid, by resolution of the Board of Estimate and Apportionment, at a stated meeting on July 30, 1914, attempted to discontinue said condemnation proceeding.

(30) That neither the City of New York nor any department thereof has ever attempted to acquire title to said premises referred to in paragraph 2 of this petition, or any part thereof, for the purpose of legalizing or carrying into effect the said dock department plan of 1871 or any subsequent plan, except as aforesaid. 56

(31) Upon information and belief, that on or about May 1, 1916, the Commissioner of Docks of the City of New York, adopted and transmitted to the Commissioners of the Sinking Fund of the City of New York, a plan for the alteration and amendment of the amended new plan between West 38th and West 42nd Streets, North River, Borough of Manhattan. The amendment consists of the discontinuance of the proposed bulkhead line of 1871, and the establishment of a new bulkhead line 100 feet in shore thereof. 57

(32) That the proceedings and communications of the Commissioner of Docks, Comptroller of the City of New York, the Commissioners of the Sinking Fund, are attached hereto and made a part hereof, as if set forth herein at length and marked "Schedule I".

58 *Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion.*

(33) That the object of this amendment, as expressed in one of said communications, was to increase the length of the piers 100 feet.

(34) That upon information and belief on or about the 30th day of March, 1920, the Commissioner of Docks adopted a new plan for the amendment of the amended new plan, and on or about the same day transmitted said new plan to the Mayor and Commissioners of the Sinking Fund for their approval, as appears by the letter from
59 the Commissioner of Docks to the Mayor and Chairman of the Commissioners of the Sinking Fund, together with said proposed plan all attached hereto and made a part hereof and marked "Schedule J".

(35) Upon information and belief, that these proposed alterations and amendments of the amended new plan, and the new plan itself were ineffective to deprive the petitioners of their property and property rights aforesaid, and in no wise or manner impaired or affected their right to fill in and improve their said property at their pleasure, or the relief to be granted herein.

60 (36) That from time to time, the City of New York, acting through the Commissioner of Docks, or the Commissioner of Docks and Ferries, has undertaken the improvement of the water front, consisting of petitioners' premises, and has unlawfully exercised their control and dominion thereover, by building piers in the streets, and by leasing the sides of the piers by dredging the petitioners' lands under water and by using petitioners' premises for slips and basins appurtenant to said piers.

(37) That all of the aforesaid acts have been done without the permission and against the will

 61

of the petitioners or their predecessors in title. That no compensation has ever been made to them and no right has ever been given by them to the said City or any department thereof for any of the acts aforesaid.

(38) Upon information and belief, that the petitioners have an absolute right to fill in and improve their said premises in accordance with either of the plans submitted by them to the Dock Department, without interference, or right of interference from the City of New York, or any department or agency thereof. 62

(39) That in order that such work could be done without such interference, application was made to the Commissioner of Docks in the manner aforesaid; that the refusal of the said Commissioner of Docks to give his permission to the prosecution of the work was arbitrary and unwarranted; that the refusal was based solely upon the ground that the proposed improvement was not in accordance with the new plan; that it is obvious that no improvement could be made according to the new plan which would be of .... advantage to the petitioners; that it is also obvious that they 63 are under no obligation or requirement to recognize the new plan or any alterations or amendments to the new plan until said new plans are lawfully created and established as provided by the statutes in such cases made and provided.

WHEREFORE, the petitioners pray that a peremptory writ of mandamus, directed to Murray Hulbert as Commissioner of Docks of the City of New York be issued commanding and directing him forthwith to issue to the petitioners a certificate or written authority permitting them to im-

64 *Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion.*

prove their said property, mentioned and described in paragraph 2 of this petition, as set forth in paragraph 4 of this petition and for such other and further relief as may be just, together with the costs of this proceeding.

EDGAR S. APPLEBY,
JOHN S. APPLEBY,
Petitioners.

BANTON MOORE,
65 Atty. for Petitioners,
95 William Street,
Borough of Manhattan,
City of New York.

66

State of New York,)
County of New York) ss.: 67

Edgar S. Appleby and John S. Appleby being duly sworn, say: that they are the petitioners in the above entitled proceeding; that the foregoing petition is true to their own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters they believe it to be true.

Edgar S. Appleby,
John S. Appleby.

68

Sworn to before me this)
28th day of May, 1920.)
Geo. B. Lauck,
Notary Public, Kings Co., No. 44.
New York Co. No. 258, Register's No. 2212.
Term expires March 30, 1922.

69

70 *Petition, Schedule A, Application.*

*To the Commissioner of Docks:*

DEPARTMENT OF DOCKS AND FERRIES,

PIER "A," BATTERY PLACE,

NEW YORK CITY.

Date, December 5th, 1919.

Sir: Application is hereby made for permission to do the work hereinafter described.

71 1. The exact location of the property on which the work is to be done is as follows:

Parcel No. 1, West side of 12th Ave., between West 39th to West 40th Streets, Manhattan.

Parcel No. 2, West side of 12th ave., between West 40th to West 41st Streets, Manhattan.

Map of location shown in deeds and plans.

2. The premises are designated on the tax maps of The City of New York as:

Lt. 17 Block No. 665 Section No. 3 Borough of Manhattan.

Lt. 3 Block No. 1107 Section No. 4 Borough of Manhattan.

72 3. The name and address of the owner of the property is as follows

| Names. | Addresses. |
|---|---|
| Edgar S. Appleby | 11 John Street Manhattan. |
| John S. Appleby | 55 Liberty Street, Manhattan. |

4. When and under what authority were last improvements, if any, upon above-described property, made and completed? none.

5. What was the nature and cost of these improvements, and by whom made? (State what

73

improvement consisted of, whether filling in of lands under water or erection of bulkheads, piers, buildings and other structures.) none.

6. The proposed work consists of: (Describe accurately the work to be done.)

(1) By plan No. 1.

(2) By plan No. 2.

*Plan No. 1.*

This plan provides for the construction of a platform on piles, both vertical and bracing, with a close row of sheet piling on the inner line of the platform, within the limits shown on the plans. 74
It is also proposed to deposit rip-rap, taking a natural slope from the sheet piling to about the front lines of the platform. Piles are to be about eighty feet in length and all timber workmanship, etc., to conform to the requirements of the Department of Docks for similar type of construction. Along the northerly line of 39th Street and the southerly line of 41st Street, it is proposed to drive a close row of piling between the existing shore line and the platform structure.

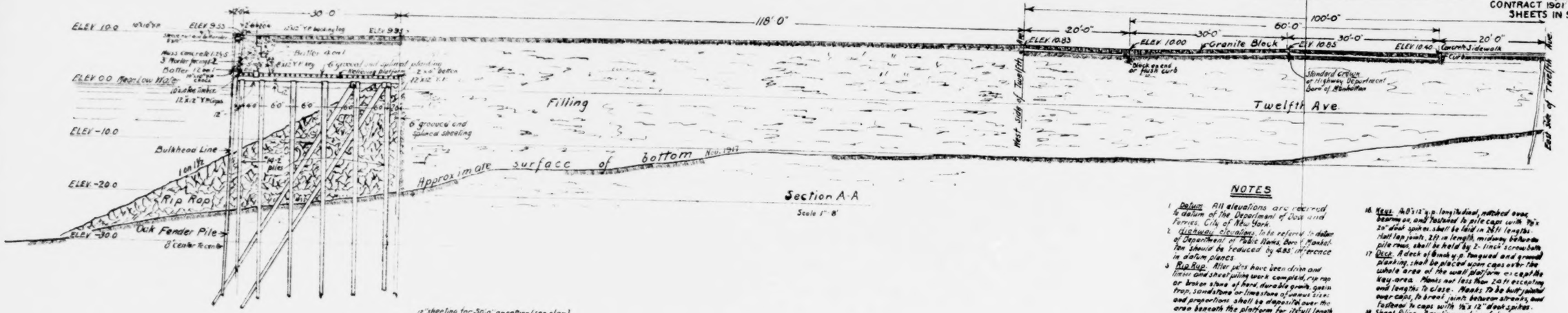
The construction is intended to make possible the filling in, grading and paving of the streets 75
and avenue within the lines of the improvement as shown on plans.

*Plan No. 2.*

This plan is proposed as an alternative. It provides for the erection of a platform structure on piles, constructed along the lines of an ordinary open pier. Details of construction are shown on plans.

7. What is the estimated cost of the proposed work for which a Permit is asked? (State cost for each class of work.)

CONTRACT 1901 SHEET 1
SHEETS IN SET, 2.




## NOTES

1. Datum. All elevations are referred to datum of the Department of Docks and Ferries, City of New York.
2. Highway elevations. To be referred to datum of Department of Public Works, Boro of Manhattan. Should be reduced by 4.85 for reference in datum planes.
3. Rip Rap. After piles have been driven and timber and sheet piling work completed, rip rap or broken stone of hard, durable granite, gneiss trap, sandstone or limestone of various sizes and proportions shall be deposited over the area beneath the platform for its full length and to the grade shown on the drawings and shall be subject to the approval of the Engineer.
4. The bulkhead wall shall be constructed of mass concrete, supported upon a planked pile platform. Along the inshore face of the platform shall be driven a continuous line of 6 inch tongued and grooved sheet piling, with a rip rap embankment deposited in front thereof.
5. The various materials employed shall comply with City of New York specifications on file in the office of the Chief Engineer, Dept of Docks and Ferries, and must pass its tests and inspections of the Engineer.
6. Exposed surfaces of metal work shall be thoroughly painted with two coats of red lead. Paint heads of all fender piles shall receive two coats of white lead and oil.
7. Workmanship. All timber framing shall be of the best quality of workmanship. Mortises and tenons, scarfs and other joints shall be thoroughly fitted, equal to Department of Docks and Ferries standard.
8. All pile heads and surfaces, pig bowels, scarfs, half laps, tenons, mortises, bolt for backing pieces and planes of timber coated shall be treated with dead oil of coal tar.
9. Melted Pitch. All bolt or nut countersunk holes in timber shall be filled with melted pitch.
10. Piles. All bearing and bracing piles shall be of sound and straight yellow pine, white pine, Norway Pine, or Cypress, of sufficient length to bring under the equivalent of a 12 ft fall of a 3000 hammer such that the penetration under 10 consecutive blows shall not exceed 12 inches.
11. Fender Piles shall be driven not less than 10 feet into firm bottom and shall be of Oak.
12. Piles shall be what are classed as "12-2" All piles up to 70 ft shall have 6 inch points or larger. Piles over 70 ft shall have points not less than 5 inches.
13. Bearing Piles shall be sawed off at a grade 1'-2" above mean low water and butted down 2 inches.
14. Caps. Upon transverse rows of piles shall be placed 12"x12" y.p. caps, in single lengths, and fastened with 7/8"x22" deck spikes driven at an angle.
15. Brace Pile Caps. Bearing against underside of caps and resting on two inshore bearing piles shall be placed five brace pile caps of 12"x12" yellow pine timbers, breaking joint with each other, in lengths of 28 ft except end lengths to close, which shall not be less than 15 ft. All timbers to be firm jointed midway between rows, each joint held with 12"x12"x ½ fish plate, 3 ft long, fastened with 4-1" x 20" machine bolts. Brace pile caps shall be notched out and the heads of brace piles closely fitted therein and fastened with 1-7/8"x22" spike driven through the cap.
16. Keel. 4-8"x12" y.p. long, longitudinal, notched over, bearing on, and fastened to pile caps with 7/8"x 20" drift spikes, shall be laid in 24 ft lengths. Half lap joints, 2 ft in length, midway between pile rows, shall be held by 2-1 inch screw bolts.
17. Deck. A deck of 3 inch y.p. tongued and grooved planking, shall be placed upon caps over the whole area of the wall platform except the Key area. Planks not less than 20 ft excepting end lengths to close. Planks to be butt jointed over caps, to break joint between strands, and fastened to caps with 7/8"x 12" drift spikes.
18. Sheet Piling. A continuous line of diagonally sharpened, Tongued and grooved sheet piling 6"x10" or 6"x12" shall be driven along rear face of wall platform. Sheet piling driven 4 ft into existing bottom, shall be cut off flush with platform deck and fastened to planking with 7/8"x12" deck spikes.
19. Wall of Mass Concrete of shape and dimensions shown shall be constructed upon the pile platform.
20. Forms of substantial work manship and material, the end portion of which shall center over caps, shall be of such lengths (16 to 28 ft) as will assure the complete concrete deposit of each section within a day's work. Inside face of forms shall be given a coat of oil or other suitable material.
21. Concrete, consisting of "facing and backing" shall be acceptable to the Engineer regarding materials, workmanship, Curing, loading and placing and Finishing.
22. Facing concrete 3 inches thick, shall extend over the outer faces and top of the wall. It shall be mixed in the proportions of 1:2, and not be wet. Stone ¾" to 1¼" shall be used.
23. Backing concrete shall comprise the remainder of the wall. It shall be mixed in the proportions of 1:2½:5. Stone 2½ to 1¼" to be used.
24. Cement. Portland cement passing the standard specifications of the A.S.C.E. shall be used in the work.
25. Sand. Clean, sharp, siliceous sand equal to the best grade of "Low Bay" or Hempstead Harbor Shall be used in the proportions noted in paragraphs 22 23
26. Gravel or Broken Stone. Graded stone of uniform texture, clean, hard, unimpregnated and durable to be used.
27. Curb Protector, Anchors, Anchor bolts, Threaded Fingers, Clamped Plate, Sleeve Nuts shall be placed in the wall in proper positions to secure fender pile chains, bitts, backing logs, sewer and water main supports.
28. Recesses 3'x8" or 30" intervals shall be placed in the wall.
29. Coping. Pile Caps of 12"x12" y.p. timber in lengths of at least 25 ft arranged over piles and with half 12" lap joints, securely fastened and located between pile rows shall be placed in the work.
30. Cleats of 12"x12" y.p. timber, securely fastened with 3-7/8"x 10" deck spikes, with solid bearings, and extending between fender piles, shall be placed against the timber of wall.
31. Coping shall be granite block with tar joints laid to satisfaction of Engineer and comply with standard specifications of Dept. of Docks and Ferries.

PLAN SHOWING PROPOSED IMPROVEMENT
39th TO 41st NORTH RIVER N.Y.
PROPERTY OF
EDGAR S. APPLEBY AND JOHN S. APPLEBY

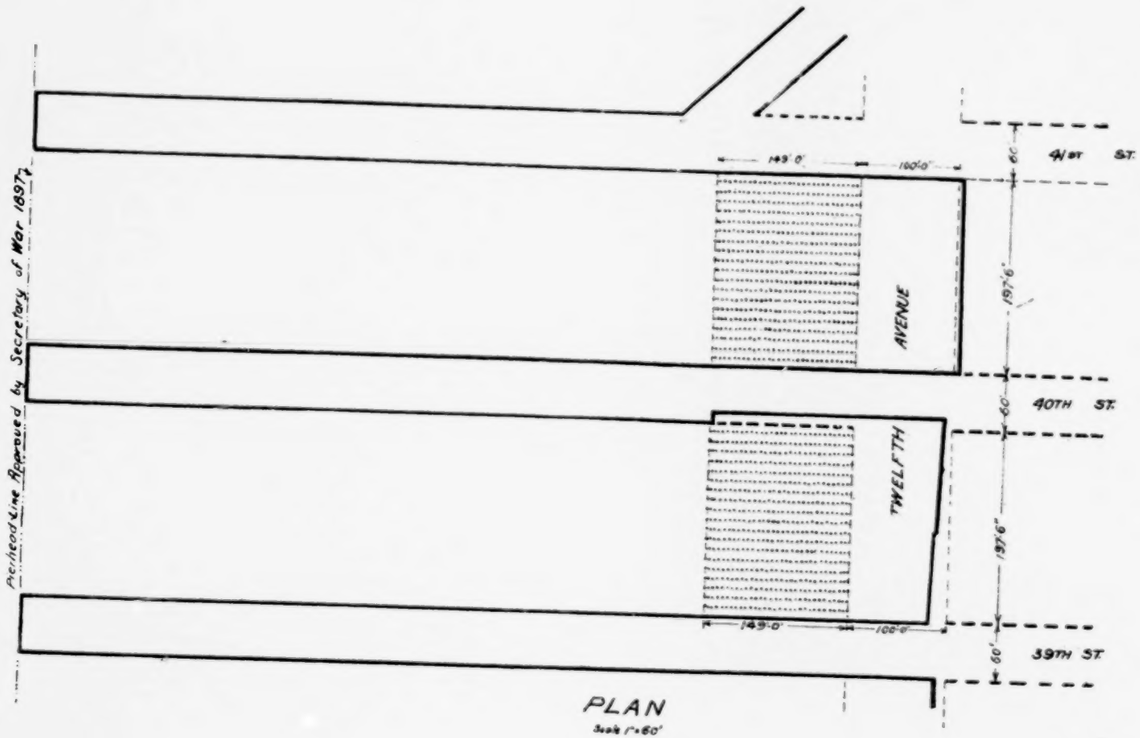
Plan No 1 – Part of Schedule A

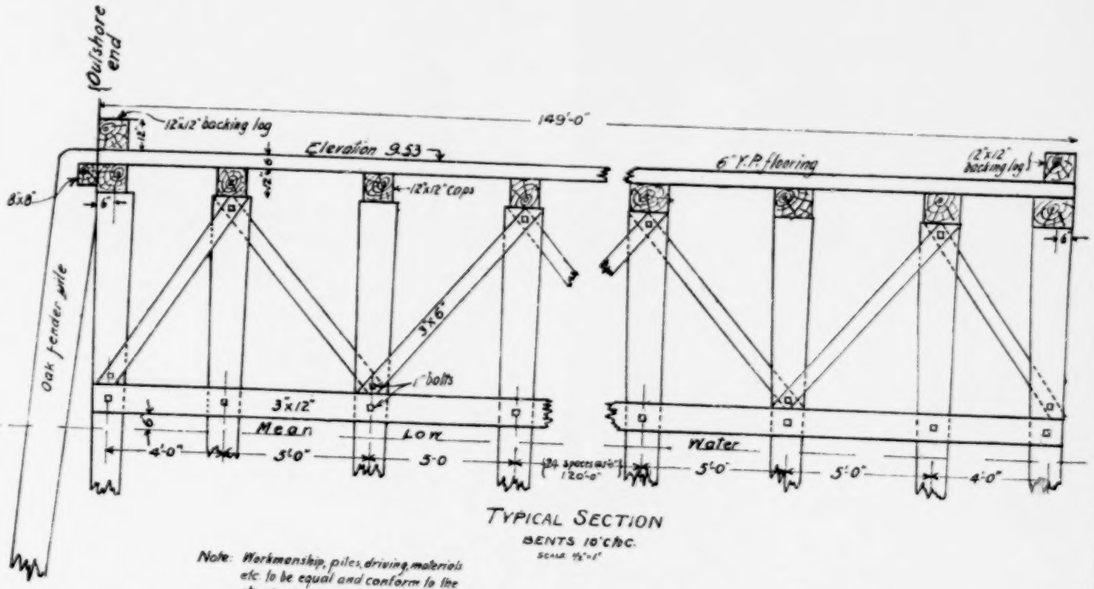
August 1, 1919
Scale 1"=60ft.

Designed by
J. A. BENSEL
CONSULTING ENGINEER
111 BROADWAY, N.Y.

File Cont 1901 ACC 2889

# Plan № 2 – Part of Schedule A




Note: Workmenship, piles, driving, materials etc to be equal and conform to the standards of The Department of Docks and Ferries of the City of New York

PLAN of PROPOSED IMPROVEMENT
39th to 41st STREETS, NORTH RIVER
NEW YORK CITY
PROPERTY OF
EDGAR S. APPLEBY 2nd JOHN S. APPLEBY

August 1st 1919
Scale as noted

Designed by
J.A. BENGEL
Consulting Engineer
111 Broadway
N.Y.C.

82 *Petition, Schedule A, Application.*

Plan No. 1.....$80,000
Plan No. 2.....$50,000

8. The work is to be done by: (If not by day's labor, give names and addresses of contractors; also name and address of person who is to superintend the work; if more than one contractor, give name and address of each, with character and parts of work to be done by each.)

| *Contractors.* | *Address.* | *Character of Work.* |
|---|---|---|
| 83 | | |
| Allan N. Spooner & Sons, Inc., or as may be changed after bids are received. | Pier 11, North River | Shown on plans |

Work supervised for owner by Allan N. Spooner & Sons, Inc., subject to change.

Address Pier 11, North River.

9. Has whole, or any part, of plans been passed upon by any Federal, State or other City Department or Bureau, or have any Permits been issued therefrom for any part of proposed work; if so, give Department or Bureau issuing each Permit, and file number of plans and number and date of
84 Permit? No.

10. The nature of ownership is as follows: (If ownership is derived from any other source than is given below, state particulars.)

Property was acquired by applicants by Will of Charles E. Appleby, Deceased, date 17th day of May 1905, who acquired Parcel No. 1 from Mayor etc., of the City of New York, and Parcel No. 2 from Robert Latou, who acquired same from Mayor etc., as set forth in abstract of title. Above described property is covered by Grants of Lands Under Water from Mayor etc., of City of

New York to Chas. E. Appleby (1st Parcel) dated Aug. 1st, 1853 and from Mayor etc. of City of New York to Robert Laton, (2nd Parcel) dated 24th day of December 1852. If not acquired by purchase, deed or grant, state in full, giving particulars how premises were acquired. Present ownership under Will of Charles E. Appleby, deceased, who died at New York City, December 15th, 1913, which devised premises to applicants, as aforesaid. An exemplified copy of said Will was filed in the office of the Surrogate of New York County on or about January 23rd, 1914.

City and County of New York, ss.:

Edgar S. Appleby and John S. Appleby being duly sworn, depose and say, that they reside at New York City and Glencove, Long Island, respectively and that they are the owners of the premises described in this application; that deponent has truthfully stated the matter set forth in the foregoing application, and that all provisions of the building code, and all other laws and regulations governing said work, whether specified herein or not, and all the terms and conditions of the Permit if granted, will be complied with, in the erection of any structure, or the carrying on and completion of any and all work above described.

Edgar S. Appleby,
John S. Appleby.

Sworn to before me, this 5th day of December 1919.

Marie F. O'Donnell,
Commissioner of Deeds, City of New York.

# ABSTRACT OF TITLE

-of-

EDGAR S. APPLEBY and JOHN S. APPLEBY

-to-

PREMISES on the West side of Twelfth Avenue in the Borough of Manhattan, New York City.

A. Between West 39th Street and West 40th Street.

B. Between West 40th Street and West 41st Street.

*Petition, Schedule A, Application.* 91

PARCEL A.

| | Deed |
|---|---|
| THE MAYOR, ALDERMEN and COMMONALTY of the CITY OF NEW YORK | D. August 1, 1853<br>A. August 31, 1853<br>R. Sept. 3, 1853 |
| to | L. 638 Cp. 452 in Reg. |
| CHARLES E. APPLEBY | Office, N. Y. Co. |
| CONVEYS: | |

"ALL that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbor of 92
New York, and bounded, described and containing as follows; that is to say:

BEGINNING at a point of intersection of the line of original high-water mark with the line of the centre of Thirty-ninth Street and running thence westerly, along said centre line of Thirty-ninth Street, about one thousand and sixty-five feet to the westerly line or side of Thirteenth Avenue, said westerly line or side of the Thirteenth Avenue being the permanent exterior line of said city, as established by law, thence northerly along the westerly line or side of the Thirteenth Avenue, 93
two hundred and fifty-eight feet, four and one-half inches to a line running through the centre of Fortieth Street; thence easterly, along said centre line of Fortieth Street, about one thousand one hundred and twenty-six feet, eleven inches to the line of original high-water mark, and thence in a southerly direction along said centre line of original high-water mark, as it runs to the point or place of beginning, as particularly described, designated and shown on a map hereto annexed dated New York, June, 1853, made by John J. Serrel, City Surveyor, and to which reference may be

94 *Petition, Schedule A, Application.*

had; said map being considered a part of this Indenture. The premises conveyed being colored pink on said map, be the said dimensions more or less."

Includes premises in question shown on preceding diagram as Parcel A.

PARCEL B.

| | |
|---|---|
| THE MAYOR, ALDERMEN and COMMONALTY of the CITY OF NEW YORK | Deed<br>D. December 24, 1852<br>A. December 30, 1852<br>R. January 3, 1852 |
| 95 to | L. 653 Cp. 170 in Reg. |
| ROBERT LATOU | Office, N. Y. Co. |
| CONVEYS: | |

"ALL THAT certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbour of New York, and bounded, described and containing as follows; that is to say:

BEGINNING at the point of intersection of the line of original high-water mark with the line of the centre of Fortieth Street and thence running westerly along said centre line of Fortieth Street
96 one thousand one hundred and twenty-six feet eleven inches to the westerly line or side of the Thirteenth Avenue, said westerly side of the Thirteenth Avenue being the permanent exterior line of said City as established by law; thence northerly along the westerly line or side of the Thirteenth Avenue two hundred and fifty-eight feet four and a half inches to the line of the centre of Forty-first Street; thence easterly along said centre line of Forty-first Street one thousand three hundred and thirty-eight feet eleven inches to the line of the original high water mark and thence in a southwesterly direction along said line

97

of original high water mark as it runs to the point or place of beginning.

As particularly described, designated and shown on a map hereto annexed dated New York, December, 1852, made by John I. Serrell, City Surveyor, and to which reference may be had said map being considered a part of this indenture the premises conveyed being colored pink on said map be the said dimensions more or less."

Includes premises in question shown on preceding diagram as Parcel B.

98

| | Deed |
|---|---|
| Robert Latou | D. January 12, 1854 |
| to | A. January 16, 1854 |
| Charles E. Appleby | R. June 16, 1865 |
| | L. 932 Cp. 458 in Reg. |
| Conveys: | Office of N. Y. Co. |

Same premises as in preceding deed of the Mayor, Aldermen and Commonalty of the City of New York to Robert Latou, by same description and includes said Parcel B.

Parcels A and B.

99

| | |
|---|---|
| Last Will and Testament and Codicil | Will dated May 17, 1905 |
| | Codicil " Aug. 22, 1912 |
| of | Probated Dec. 26, 1913, |
| Charles E. Appleby, | in Surrogate's Office of |
| Dec'd. | Monmouth County, New |
| | Jersey. |

Said testator gives and devises all his "property and estate, real and personal to my two sons, Edgar Storm Appleby and John Storm Appleby in equal shares."

And appoints Edgar Storm Appleby and John Storm Appleby executors.

100 *Petition, Schedule A, Application.*

A codicil to said will is dated August 22, 1912, and provides that "no bonds or other security be required of or from the executors named in my said will, or either of them upon the issuing of Letters Testamentary to them or either of them".

EXEMPLIFIED COPIES of said Will and Codicil were duly filed in the office of the Surrogate of New York County on or about January 23, 1914, and in the office of the Clerk of New York County on or about the 24th day of January, 1914.

101

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Title to Parcels A and B is now vested in Edgar Storm Appleby and John Storm Appleby in equal shares.

102

**Schedule B. Letter from Commissioner of Docks.** 103

CITY OF NEW YORK

Department of Docks.

Office of the Commissioner.

Pier A, North River, January 31st, 1920.

McK/AC
130282

To: Hon. J. A. Bensel,
111 Broadway,
New York City. 104

From: Department of Docks.

Subject: Denial of application of John S. Appleby and Edgar S. Appleby.

1. Replying to your letter of the 26th instant, I beg to advise you that the application of Edgar S. Appleby and John S. Appleby for permission to construct either a platform between West 39th and West 41st Streets, North River or a concrete wall on platform construction with sheet piling along the inner side to retain filling is hereby formally denied on account of the fact that the proposed construction is not in accordance with the new plan. 105

(Signed) MURRAY HULBERT,
Commissioner of Docks.

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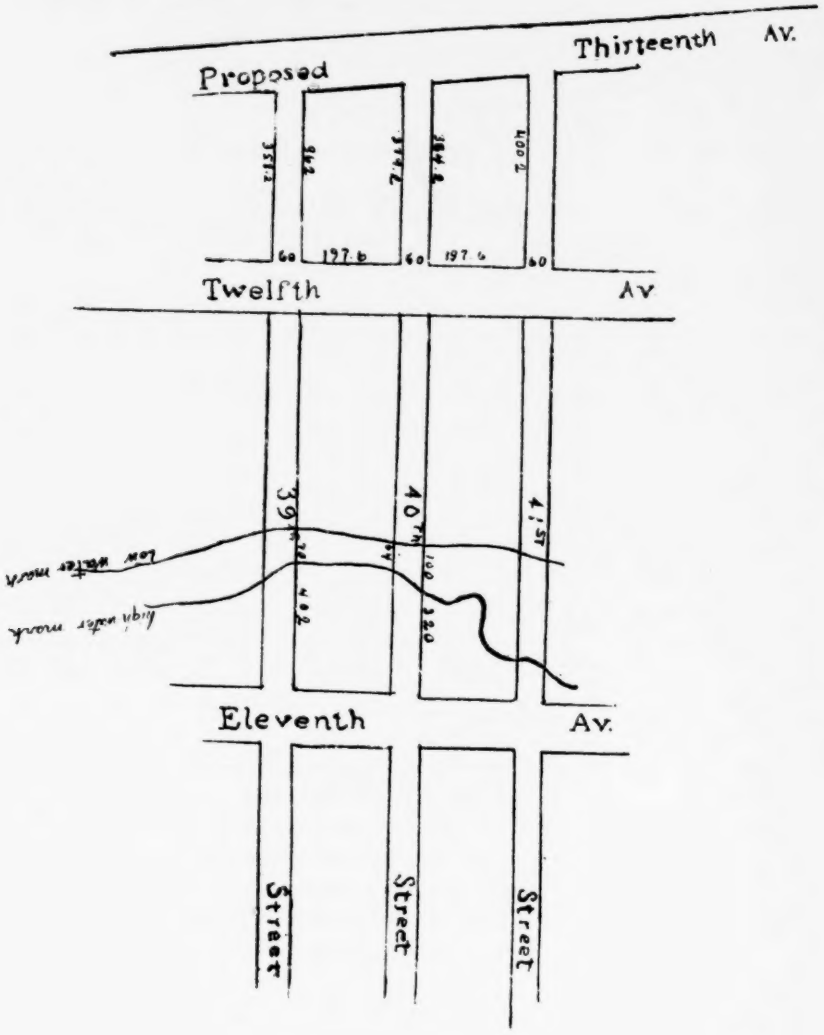
**Schedule C. "1916 Amendment of Plan of 1871," Printed With Schedule I.**

**Schedule D. Smith Map of 1837.**

# Schedule D

## HUDSON RIVER.




Map
Shewing a projected Exterior Line
of the
City of New York
extending along the Hudson River
from
Hammond Street
to
135th Street

*Petition, Schedule F, Grant to Charles E. Appleby.* 109

**Schedule E. Chapter 182 of the Laws of 1837 (Not Printed).**

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**Schedule F and Part of Schedule A.**

## GRANT TO CHARLES E. APPLEBY AUGUST 1, 1853.

THIS INDENTURE, made the first day of August, One thousand eight hundred and fifty-three. 110

Between THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, of the first part,
and CHARLES E. APPLEBY, of the second part.

WITNESSETH, that the said parties of the first part for and in consideration of the sum of Six thousand, three hundred and sixty-nine Dollars and thirty-seven cents, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, 111 bargained, sold, aliened, released and conveyed, and by these presents do grant, bargain, sell, alien, release and convey unto the said party of the second part, and to his heirs and assigns

ALL that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbor of New York, and bounded, described and containing as follows; that is to say:

BEGINNING at a point of intersection of the line of original high-water mark with the line of the centre of Thirty-ninth Street and running

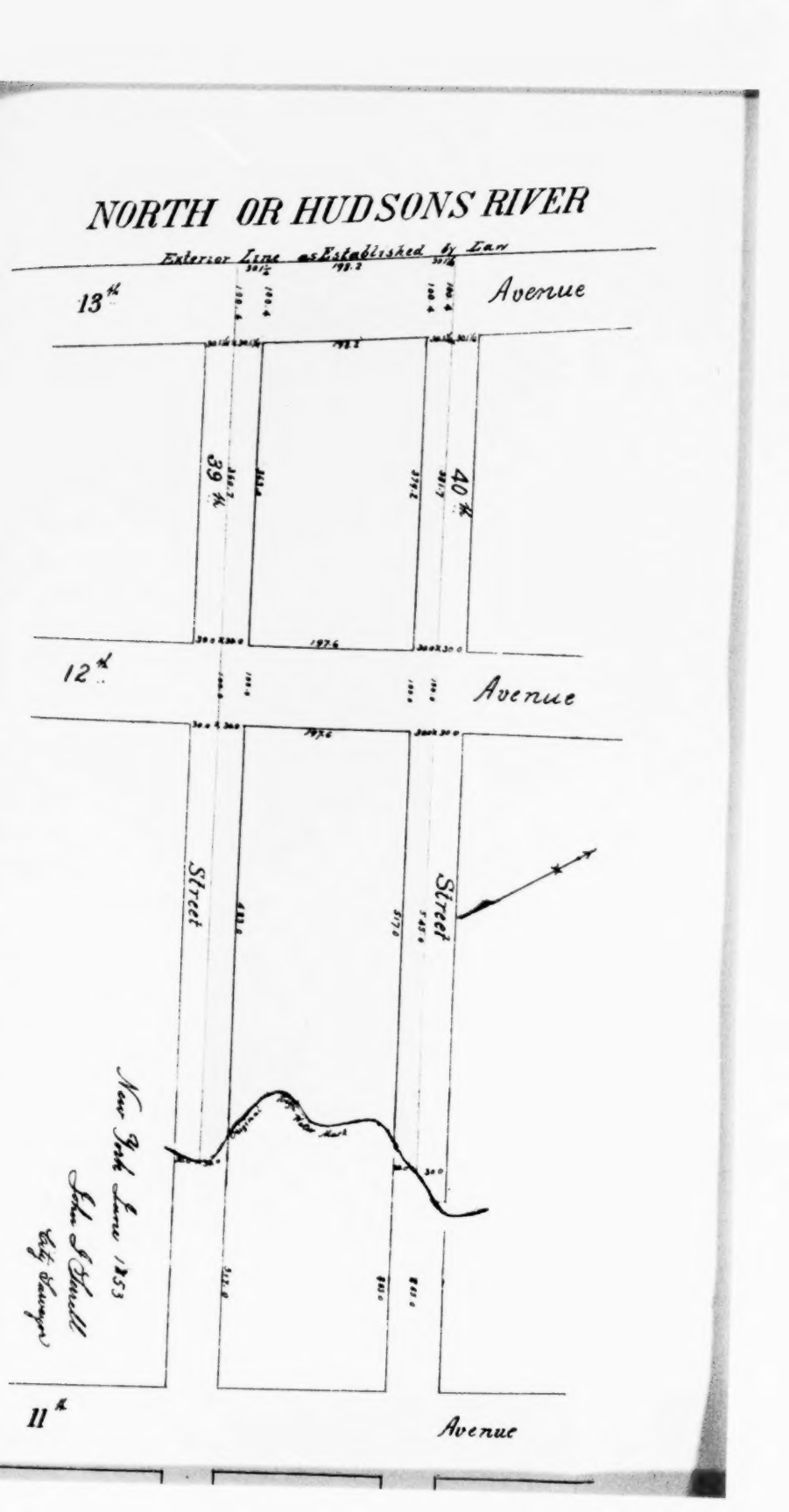
112 *Petition, Schedule F, Grant to Charles E. Appleby.*

thence westerly, along said centre line of Thirty-ninth Street, about one thousand and sixty-five feet to the westerly line or side of Thirteenth Avenue, said westerly line or side of the Thirteenth Avenue being the permanent exterior line of said city, as established by law, thence northerly along the westerly line or side of the Thirteenth Avenue, two hundred and fifty-eight feet, four and one-half inches to a line running through the centre of Fortieth Street; thence easterly, along said cen-
113 tre line of Fortieth Street, about one thousand one hundred and twenty-six feet, eleven inches to the line of original high-water mark, and thence in a southerly direction along said centre line of original high-water mark, as it runs to the point or place of beginning, as particularly described, designated and shown on a map hereto annexed dated New York, June, 1853, made by John J. Serrel, City Surveyor, and to which reference may be had; said map being considered a part of this Indenture. The premises conveyed being colored pink on said map, be the said dimensions more or less.

SAVING AND RESERVING from and out of
114 the hereby granted premises so much thereof as by said map annexed forms part or portions of the Twelfth and Thirteenth Avenues, Thirty-ninth and Fortieth Streets, for the uses and purposes of Public Streets, Avenues and highways as hereinafter mentioned.

TOGETHER with all and singular the privileges, advantages, hereditaments and appurtenances to the same belonging or in anywise appertaining.

AND also all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part, of, in and to all the


NORTH OR HUDSONS RIVER
Exterior Line as Established by Law
13th
Avenue
39 lk
40 lk
12th
Avenue
Street
Street
New York Lane 1853
John S. Hamell
City Surveyor
11th
Avenue

said premises and every part and parcel thereof, with the appurtenances.

To have and to hold the said premises hereby granted to the said Charles E. Appleby, his heirs and assigns to his own proper use, benefit and behoof forever.

And the said party of the second part, for himself, his heirs and assigns, doth hereby covenant and agree to and with the said parties of the first part, their successors and assigns, that the said
119 party of the second part, his heirs and assigns shall and will within three months next after he or they shall be thereunto required by the said parties of the first part, or their successors, at his or their own proper costs and charges build, erect, make and finish or cause to be built, erected, made and finished according to any resolution or ordinance of the said parties of the first part, or their successors, already passed or adopted four good and sufficient Bulk-heads, Wharves, Streets and Avenues which shall form so much and such parts of the Twelfth and Thirteenth Avenues, and
120 Thirty-ninth and Fortieth Streets as fall within the limits of the premises above described, and are reserved as aforesaid, from out thereof for public streets and will fill in the same with good and sufficient earth and regulate and pave the same and lay the sidewalks thereof.

And also that the said party of the second part, his heirs and assigns shall and will from time to time and at all times forever hereafter at his own proper costs, charges and expenses uphold and keep in good order and repair the whole of those parts of the said Twelfth and Thirteenth Avennes and Thirty-ninth and Fortieth Streets, which the

121

said party of the second part hath covenanted and agreed to make, erect and build as aforesaid, and will at all times forever hereafter obey, fulfill and observe such ordinances, resolutions, orders and directions as the said parties of the first part, and their successors shall from time to time enact and pass or make relative thereto.

And also that the said streets and avenues shall forever thereafter continue to be and remain public streets and avenues and highways for the free and common use and passage of the Inhabitants 122
of said City, and others passing and repassing by, through and along the same in like manner as the other public streets, avenues, bulkheads and wharves of the said City now used or lawfully ought to be and in case default shall be made by said party of the second part, his heirs and assigns, in building, erecting, making or finishing the said bulkheads, wharves, streets and avenues by him covenanted herein to be built, erected, made and finished, and in filling in the same or any part thereof, or in complying with any ordinance, resolution or order of the said parties of
the first part, or their successors when required 123
then, and in that case it shall and may be lawful for the said parties of the first part or their successors to build, erect, make, or finish the bulkheads, wharves, streets and avenues as aforesaid, and to fill in the same and to regulate and pave the same and to lay the sidewalks thereof at the proper costs and charges of the said party of the second part, his heirs and assigns, and to charge to and recover in an action at law from the said party of the second part, his heirs and assigns the amount thereof, together with the interest

thereon and all costs and charges of the proceedings relative to the same, or to sell and dispose of the said hereby granted premises, or any part thereof, at Public Auction for the most that can be had for the same, and in case of any deficiency to charge with and recover from the said party of the second part, his heirs and assigns, the amount of such deficiency, or to adopt and pursue any legal right or remedy that the said parties of the first part, or their successors now possess,
125 and enjoy under and by virtue of any act of the Legislature of the State of New York, or that may hereafter be granted unto the said parties of the first part, or their successors by the Legislature of the State of New York, or to enter into and upon the whole or any part of the hereby granted premises and to grant the same and the right of making said bulkheads, wharves, streets or avenues, and the right receiving the wharfage, cranage and profits arising to and from the same, to any other person or persons their heirs, and assigns forever.

126 AND also that the said party of the second part his heirs and assigns shall and will pay and satisfy all taxes, assessments and impositions as well ordinary as extraordinary as are now or shall or may hereafter be lawfully so imposed or levied upon the hereby granted premises under and by virtue of any act or acts, of the Congress of the United States of America, or of the Legislature of the State of New York, or by any act, ordinance or resolution of the said parties of the first part, or their successors.

And it is hereby further covenanted and agreed, by and between the parties to these presents, and

*Petition, Schedule F, Grant to Charles E. Appleby.* 127

the true intent and meaning hereof, is that the said party of the second part, his heirs and assigns will not build the said wharves, bulkheads avenues or streets herein before mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the 128
hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose.

AND the said parties of the first part, for themselves, their successors and assigns do covenant and agree to and with the said party of the second part, his heirs, and assigns that the said party of the second part, his heirs and assigns observing, fulfilling and keeping all and singular the articles, covenants and agreements herein mentioned and contained on his part to be kept and performed according to the true intent and meaning of these presents, shall and lawfully may from time to time 129
and at all times hereafter fully have, and enjoy, take and receive and hold to his own proper use, all manner of wharfage, cranage advantages or emoluments growing or accruing by or from that part of the said exterior line of the said City, lying on the westerly side of the hereby granted premises fronting on the Hudson River, with full power to collect and receive the same for his own proper use and benefit forever.

EXCEPTING therefrom such wharfage, cranage advantages and emoluments to grow or accrue from the westerly end of the bulkhead in front of

the entire width of the northerly half part of Thirty-ninth Street and the southerly half part of Fortieth Street, which shall be and are hereby reserved for the said parties of the first part, their successors and assigns with full power to collect and receive the same for their own proper use and benefit forever.

AND it is hereby further agreed by and between the parties to these presents, and the true intent and meaning thereof, is that this present grant and
131 every word or thing in the same contained shall not be construed or taken to be a covenant or covenants of warranty or of seizin, of said parties of the first part or their successors or to operate further than to pass the estate, right, title of interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several charters and the various acts of the Legislature of the People of the State of New York.

AND it is hereby further mutually understood and agreed and these presents and the estate hereby granted are upon the express condition, that if at any time hereafter it shall appear that the said
132 party of the second part is not on the day of the date hereof lawfully entitled to take and receive this grant as the purchaser of the right thereto, from the proprietors of the lands and premises on the easterly side of the premises hereby granted, and adjoining the same; or if the said party of the second part, his heirs and assigns shall make default in the performance of any or either of the covenants above contained on his part, and behalf, to be observed, performed, fulfilled and kept, then, and in every such case, these presents and every article, clause or thing herein contained shall be and become absolutely null and void.

*Petition, Schedule F, Grant to Charles E. Appleby.*

AND the said parties of the first part, and their successors shall and may forthwith thereupon enter into and upon the said premises hereby granted and shall thereafter be seized of the same with the appurtenances free, clear and discharged of, and from any claim, right, or pretence of claim, or right of the said party of the second part, his heirs and assigns anything herein contained to the contrary notwithstanding. 133

AND the said party of the second part, covenants and agrees to pay all expenses which has been incurred by said parties of the first part for regulating the streets embraced in this grant between the high-water mark, and the permanent exterior line of said city. 134

AND the said party of the second part, for himself, his heirs and assigns doth hereby covenant and agree to and with the said parties of the first part, their successors and assigns, that he the said party of the second part his heirs and assigns shall and will in all things well and faithfully comply with and fulfill and perform all and every of the covenants, conditions and agreements, undertakings and provisions herein contained and on his part to be kept, performed and complied with. 135

IN WITNESS WHEREOF, to one part of these presents remaining with the said parties of the first part, the said party of the second part, hath set his hand and seal and to the other part thereof remaining with the said party of the second part, the said parties of the first part have caused the Common Seal of The City of New York to be affixed the day and year first above written.

JACOB A. WESTERVELT,
Mayor.

(Seal)

By The Common Council,
D. T. VALENTINE, Clk., C. C.

136 *Petition, Schedule F, Grant to Charles E. Appleby.*

City and County of New York, ss.:

On this 31st day of August, 1853, before me came David T. Valentine, to me personally known and who being by me duly sworn, did depose and say: That he resides in the City of New York; that he is the Clerk of the Common Council of The City of New York that the seal affixed to the foregoing instrument is the Corporate Seal of The City of New York, and was affixed thereto by their authority.

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CHARLES BURDETT,
Commr. of Deeds.

Recorded the preceding at the request of Varnum, Turney & Co., September 3d, 1853, at 58 Minutes past 12 P. M.

(Seal.)

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139

## Schedule G and Part of Schedule A.

### Grant to Robert Latou, December 24, 1852.

THIS INDENTURE made the twenty-fourth day of December, one thousand eight hundred and fifty-two.

Between THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, of the first part and ROBERT LATOU of the second part.

WITNESSETH that the said parties of the first part for and in consideration of the sum of Four 140
thousand nine hundred and thirtly-seven 50/100 dollars lawful money of the United States of America to them in hand paid by the said party of the second part the receipt whereof is hereby acknowledged HAVE granted, bargained, sold, aliened, released and conveyed and by these presents DO grant, bargain, sell, alien, release and convey unto the said party of the second part and to his heirs and assigns

ALL THAT certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbour of New York and bounded, described and containing 141
as follows, that is to say:

BEGINNING at the point of intersection of the line of original high water mark with the line of the centre of Fortieth Street and thence running westerly along said centre line of Fortieth Street one thousand one hundred and twenty-six feet eleven inches to the westerly line or side of the Thirteenth Avenue, said westerly side of the Thirteenth Avenue being the permanent exterior line of said City as established by law; thence northerly along the westerly line or side of the Thir-

142 *Petition, Schedule G, Grant to Robert Laton.*

teenth Avenue two hundred and fifty-eight feet four and a half inches to the line of the centre of Forty-first Street; thence easterly along said centre line of Forty-first Street one thousand three hundred and thirty-eight feet eleven inches to the line of the original high water mark and thence in a southwesterly direction along said line of original high water mark as it runs to the point or place of beginning

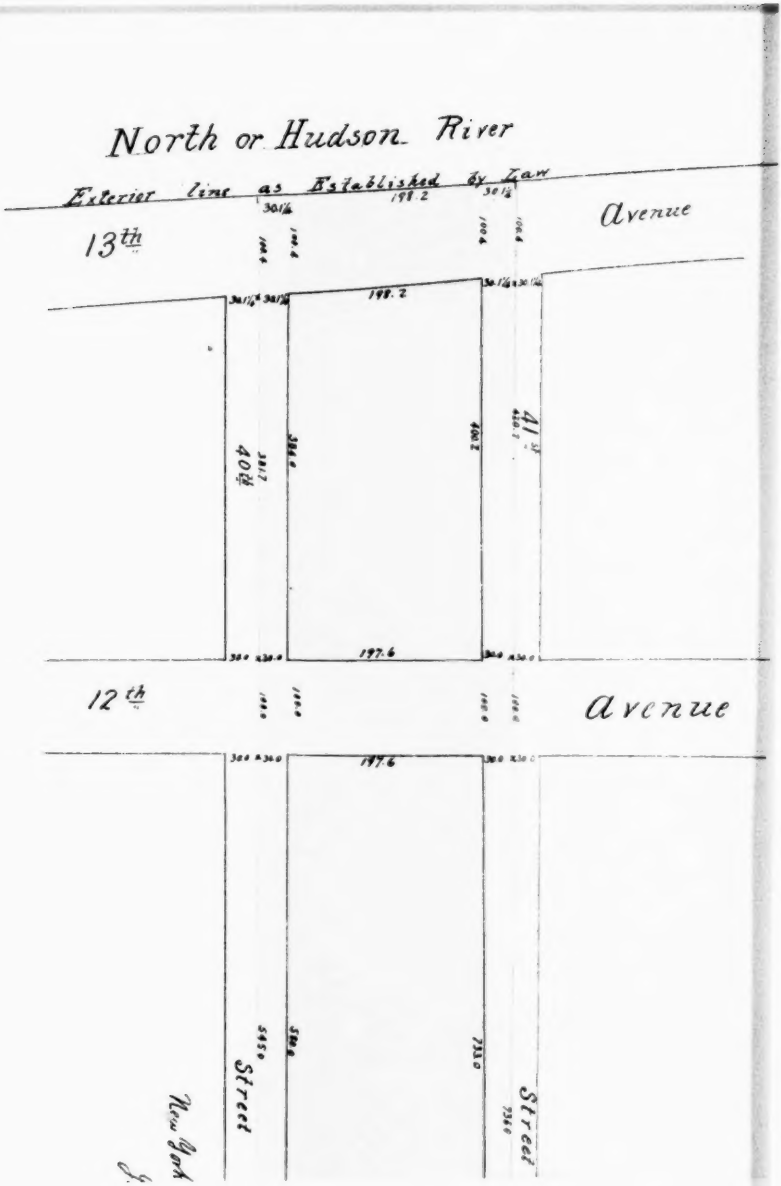
As particularly described, designated and shown on a map hereto annexed dated New York, Decem-
143 ber, 1852, made by John I. Serrell, City Surveyor, and to which reference may be had said map being considered a part of this indenture the premises conveyed being colored pink on said map be the said dimensions more or less

SAVING AND RESERVING from and out of the hereby granted premises so much thereof as by said map annexed forms parts or portions of the Twelfth and Thirteenth Avenues and Fortieth and Forty-first Streets for the uses and purposes of public streets, avenues and highways as hereinafter mentioned.

. TOGETHER with all and singular the priv-
144 ileges, advantages, hereditaments and appurtenances to the same belonging or in anywise appertaining.

AND ALSO all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part of in and to the said premises and every part and parcel thereof with the appurtenances.

TO HAVE AND TO HOLD the said premises hereby granted to the said Robert Laton, his heirs and assigns to his own proper use, benefit and behoof forever.


North or Hudson River
Exterior line as Established by Law
198.2
13th Avenue
30 1/2
100.4
100.4
30 1/2
198.2
30 1/2
30 1/2
100.4
100.4
30 1/2
40th
100.2
100.2
41st
197.6
197.6
12th Avenue
100.4
100.4
197.6
100.4
100.4
100.2
100.2
Street
Street
New York

148 *Petition, Schedule G, Grant to Robert Laton.*

AND the said party of the second part for himself his heirs and assigns doth hereby covenant and agree to and with the said parties of the first part their successors and assigns that the said party of the second part his heirs and assigns shall and will within three months next after he or they shall be thereunto required by the said parties of the first part or their successors at his or their own proper costs and charges build, erect, make and finish or cause to be built, erected, made and finished according to any resolution or ordinance
149 of the said parties of the first part or their successors already passed or adopted or that may hereafter be passed or adopted four good and sufficient Bulkheads, Wharves, Streets or Avenues which shall form so much and such parts of the Twelfth and Thirteenth Avenues and Fortieth and Forty-first Streets as fall within the limits of the premises first above described and are reserved as aforesaid from out thereof for public streets

AND will fill in the same with good and sufficient earth and regulate and pave the same and lay the sidewalks thereof.

AND also that the said party of the second part
150 his heirs and assigns shall and will from time to time and at all times forever hereafter at his own proper costs, charges and expenses uphold and keep in good order and repair the whole of those parts of the said Twelfth and Thirteenth Avenues and Fortieth and Forty-first Streets which the said party of the second part hath covenanted and agreed to make, erect and build as aforesaid and will at all times forever hereafter obey, fulfill and observe such ordinances, resolutions, orders and directions as the said parties of the first part.

AND their successors shall from time to time erect and pass or make relative thereto.

151

AND also that the said streets or avenues shall forever thereafter continue to be and remain public streets or avenues and highways for the free and common use and passage of the inhabitants of said City and all others passing and repassing by, through and along the same in like manner as the other public streets, avenues, bulkheads and wharves of the said City now are or lawfully ought to be and in case default shall be made by said party of the second part, his heirs and assigns in building, erecting, making or finishing the said bulkheads, wharves, streets or avenues by 152
him covenanted herein to be built, erected, made and finished and in filling in the same or any part thereof or in complying with any ordinance, resolution or order of the said parties of the first part or their successors when required, then and in that case it shall and may be lawful for the said parties of the first part or their successors to build, erect, make or finish the bulkhead, wharves, streets or avenues as aforesaid and to fill in the same and to regulate and pave the same and to lay the sidewalks thereof at the proper costs and charges of the said party of the second part, his heirs and assigns and to charge to and recover in 153
an action at law from the said party of the second part, his heirs and assigns the amount thereof together with the interest thereon.

AND all costs and charges of the proceedings relative to the same or to sell and dispose of the whole of the said hereby granted premises or any part thereof at public auction for the most that can be had for the same and in case of any deficiency to charge with and recover from the said party of the second part, his heirs and assigns the amount of such deficiency or to adopt and pursue any legal right or remedy that the said parties of

the first part or their successors now possess and enjoy under and by virtue of any act of the Legislature of the State of New York or that may hereafter be granted unto the said parties of the first part or their successors by the Legislature of the State of New York or to enter into and upon the whole or any part of the hereby granted premises and to grant the same and the right of making said bulkheads, wharves, streets or avenues and the right of receiving the wharfage, cranage and profits arising to and from the same to any other
155 person or persons, their heirs and assigns forever.

AND also that the said party of the second part his heirs and assigns shall and will pay and satisfy all taxes assessments and impositions as well ordinary as extraordinary as are now or shall or may hereafter be lawfully imposed or levied upon the hereby granted premises under and by virtue of any act or acts of the Congress of the United States of America or of the Legislature of the State of New York or by any act ordinance or resolution of the said parties of the first part or their successors.

AND it is hereby further covenanted and
156 agreed by and between the parties to these presents and the true intent and meaning hereof is that the said party of the second part his heirs and assigns will not build the said wharves bulkheads avenues or streets herein before mentioned or any part thereof or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had and obtained from the said parties of the first part or their successors and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permis-

sion of the said parties of the first part their successor or assigns first had for that purpose.

AND the said parties of the first part for themselves their successors and assigns do covenant and agree to and with the said party of the second part his heirs and assigns that he the said party of the second part his heirs and assigns observing fulfilling and keeping all and singular the articles covenants and agreements herein mentioned and contained on his part to be kept and performed according to the true intent and meaning of these presents shall and lawfully may from time to time 158
and at all times hereafter fully have and enjoy take and receive and hold to his own proper use all manner of wharfage cranage advantages or emoluments growing or accruing by or from that part of the said exterior line of the said City lying on the westerly side of the hereby granted premises fronting on the Hudson River with full power to collect and receive the same for his own proper use and benefit forever.

EXCEPTING therefrom such wharfage cranage advantages and emoluments to grow or accrue from the westerly end of the bulkhead in front of the entire width of the northerly half part of 159
Fortieth Street and the southerly half part of Forty-first Street which shall be and are hereby reserved for the said parties of the first part their successors and assigns with full power to collect and receive the same for their own proper use and benefit forever.

AND it is hereby further agreed by and between the parties to these presents and the true intent and meaning hereof is that this present grant and every word or thing in the same contained shall not be construed or taken to be a covenant or covenants of warranty or of seizen of said parties

160 *Petition, Schedule G, Grant to Robert Laton.*

of the first part or their successors or to operate further than to pass the estate right title or interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several Charters and the various acts of the Legislature of the People of the State of New York.

AND it is hereby further mutually understood and agreed and these presents and the estate hereby granted are upon the express condition that if at any time hereafter it shall appear that the said party of the second part is not on the day of the
161 date hereof seized of a good sure absolute and indefeasible estate of inheritance in fee simple of in and to the lands and premises on the easterly side of the premises hereby granted and adjoining the same or if the said party of the second part his heirs and assigns shall make default in the performance of any or either of the covenants above contained on his part.

AND behalf to be observed performed fulfilled and kept then and in every such case these presents and every article clause or thing herein contained shall be and become absolutely null and void and the said parties of the first part and their
162 successors shall and may forthwith thereupon enter into and upon the said premises hereby granted shall thereafter be seized of the same with the appurtenances free clear and discharged of and from any claim right or pretence of claim or right of the said party of the second part his heirs and assigns anything herein contained to the contrary notwithstanding.

AND the said party of the second part covenants and agrees to pay the assessment and the interest due and to grow due thereon for building the sewer in Forty-second Street assessed upon the premises hereby granted and also to pay all expenses which

have been incurred by said parties of the first part for regulating the street embraced in the grant between the High Water Mark and the permanent exterior line of said City.

AND the said party of the second part for himself his heirs and assigns do hereby covenant and agree to and with the said parties of the first part their successors and assigns that he the said party of the second part his heirs and assigns shall and will in all things well and faithfully comply with and fulfill and perform all and every of the covenants conditions and agreements undertakings and 164
provisions herein contained and on his part to be kept performed and complied with.

WITNESSETH WHEREOF to one part of these presents remaining with the said parties of the first part the said party of the second part hath set his hand and seal and to the other part thereof remaining with the said party of the second part the said parties of the first part have caused the common seal of the City of New York to be affixed the day and year first above written.

A. C. KINGSLAND, Mayor. BY THE COMMON COUNCIL, D. I. Valentine Clk. C. C. (LS).
City and County of New York, ss.: 165

On this 30 day of December, 1852, before me came David I. Valentine to me personally known who being by me duly sworn deposed and said he is a resident of the City and County of New York that he is the Clerk of the Common Council of said City that the seal affixed to the within grant is the common seal of said City and was so affixed by their authority.

Geo. L. Taylor Comr. of deeds.

RECORDED the preceding at the request of R. Laton January 3d 1853 at 45 Min. past 11 A. M.

MAPS
TOO
LARGE
FOR
FILMING

169

## Schedule I.—Proceedings of Commissioners of Sinking Fund.

COMMISSIONERS OF THE SINKING FUND OF THE CITY OF NEW YORK.

Proceedings of the Commissioners of the Sinking Fund, at a Meeting Held in Room 16, City Hall at 11 o'clock A. M. on Thursday, June 1, 1916.

Present: Frank L. Dowling, President, Board of Aldermen; Alexander Brough, Deputy and Acting Comptroller; Milo R. Maltbie, Chamberlain; 170
Francis P. Kenney, Chairman; Finance Committee, Board of Aldermen.

The minutes of the meetings held May 18th and 22nd, 1916, were approved as printed.

Dock Department: Amendment of the Amended New Plan for Improvement of the Waterfront between W. 38th and W. 42nd St., North River, Borough of Manhattan.

The Chair called for a public hearing in the matter of the alteration and amendment of the amended new plan for the improvement of the water-front between W. 38th and W. 42nd Sts., 171
Borough of Manhattan, adopted by the Commissioner of Docks in accordance with law, May 1, 1916, and transmitted to the Commissioners of the Sinking Fund for approval. (Affidavit as to publication of Notice of Hearing in the City Record on file with papers.)

The following was received from the Commissioner of Docks:

MAPS
TOO
LARGE
FOR
FILMING

*Petition, Schedule I, 1916 Proceeding for Amendment of Plan of 1871 (Including Schedule C).* 175

Pier A, North River, May 1, 1916.

Amendment to New Plan, 28th to 42nd Sts., North River.

Hon. JOHN PURROY MITCHELL, Mayor, Chairman of the Commissioners of the Sinking Fund:

Sir:

I transmit herewith tracing and print, together with technical description, for the alteration and amendment of the amended New Plan between West 38th and West 42nd Streets, North River, Borough of Manhattan. 176

The amendment consists in the discontinuance of the present bulkhead line between the northerly side of West 38th Street and the southerly side of West 42nd Street, and the establishment of a new bulkhead line 100 feet inshore thereof, and a marginal street, wharf or place.

I have today adopted this amendment to the New Plan and respectfully submit it with the request that it be approved by the Commissioners of the Sinking Fund. 177

Very truly yours,
R. A. C. SMITH, Commissioner of Docks.

No one appearing against the proposition, the Deputy and Acting Comptroller presented the following report and offered the following resolution:

178

May 26, 1916.

To the Honorable the Commissioners of the Sinking Fund:

Gentlemen:

In a communication dated May 1st, 1916, the Commissioner of Docks transmitted for approval a plan for the alteration and amendment of the amended New Plan for the improvement of the water-front and harbor of the City of New York between West 38th and
179 West 42nd Streets, North River, Borough of Manhattan.

The proposed amendment consists in the discontinuance of the present bulkhead line between the northerly side of West 38th Street and the southerly side of West 42nd Street, and the establishment of a new bulkhead line 100 feet inshore thereof, and a marginal street, wharf or place.

By this amendment, the effective length of the piers is increased 100 feet, and there is still available a width of 50 feet for a marginal street, wharf or place.

180 In the event of the Commissioners of the Sinking Fund approving the amended plan at the public hearing to be held, pursuant to chapter 372 of the Laws of 1907, the attached resolution is recommended for adoption approving the request. Respectfully,

ALEX BROUGH,
Deputy and Acting Comptroller.

Resolved, That the Commissioners of the Sinking Fund hereby approve of the plan for the amendment of the plan, for the improvement of the waterfront and harbor of The

*Petition, Schedule J, 1920 Proceedings & Amendment of Plan of 1871.* 181

City of New York between the northerly side of West 38th Street and the southerly side of West 42nd Street, North River, Borough of Manhattan, as adopted by the Commissioner of Docks in accordance with law May 1, 1916.

The report was accepted and resolution adopted, all the members present voting in the affirmative.

The Chair then declared the hearing closed.

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## Schedule J.—Plan and Proceedings of 1920.

CITY OF NEW YORK

DEPARTMENT OF DOCKS

OFFICE OF THE COMMISSIONER

Pier A, North River March 30th, 1920.

McK/Ac

To: HON. JOHN F. HYLAN, 183
Mayor and Chairman of the
Commissioners of the Sinking Fund.

FROM: Department of Docks.

SUBJECT: *Transmittal of map.*

1. I transmit herewith for the approval of the Commissioners of the Sinking Fund map of the waterfront, showing proposed amendment and alteration of the plan as determined upon by the Board of the Department of Docks on April 13th, 1871 and approved by the Commissioners of the

184 *Petition, Schedule J, 1920 Proceedings & Amendment of Plan of 1871.*

Sinking Fund on April 27th, 1871 on the North River, as subsequently altered and amended between West 35th and West 43rd Streets, Borough of Manhattan, together with a technical description showing the proposed changes thereat. The principal change effected by this proposed amendment is the abolishment of seven existing piers, which are to be replaced by four modern piers each 150 feet in width with slips between 332′ 10″ in width.

185 2. I would respectfully request that you set a date for a public hearing on the proposed amendment at the earliest practicable date.

(Signed) MURRAY HULBERT,
Commissioner of Docks.

186

MAPS
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190 **Affidavit of Murray Hulbert Read in Opposition to Motion.**

SUPREME COURT,

NEW YORK COUNTY.

IN THE MATTER

*of*

191 The Application of EDGAR S. APPLEBY and JOHN S. APPLEBY, for a peremptory writ of mandamus

*against*

MURRAY HULBERT, as Commissioner of Docks of The City of New York.

192 STATE OF NEW YORK,
County of New York, } ss.:

MURRAY HULBERT, being duly sworn, deposes and says:

I am the Commissioner of Docks of the City of New York, and have been such since January 1st, 1918.

Upon information and belief, I deny each and every allegation contained in the paragraphs of the petition herein numbered respectively "3", "7", "10", "21", "23", "35", "36", "37", "38" and "39".

I deny that I have aay knowledge or information with respect to any of the allegations con-

tained in the paragraphs of the petition numbered respectively "20" and "24" sufficient to form a belief as to the truth thereof.

Upon information and belief, I deny each and every allegation contained in the paragraph of the petition numbered "2", except that the petitioners have such interest in the premises therein described as a private citizen is capable of having.

Upon information and belief, I deny each and every allegation contained in the paragraph of the petition numbered "6", except that the new plan referred to in deponent's communication of January 31, 1920, was that adopted by the Commissioner of Docks on May 1, 1916, and approved by the Commissioners of the Sinking Fund on June 1, 1916. 194

Deponent further states that the application referred to in paragraph "4" of the petition called for the construction of substantial structures and solid filling outshore of the bulkhead line shown upon the amendment of the new plan for the improvement of the waterfront of the locality in question, adopted by the Commissioner of Docks on May 1, 1916, and approved by the Commissioners of the Sinking Fund on June 1, 1916. The Commissioner was, therefore, without power to grant such application, for the reason that the carrying out thereof would be in violation of law. 193

MURRAY HULBERT.

Sworn to before me this
7th day of June, 1920.
JOSEPH A. BOYLAN,
Commissioner of Deeds, City of New York,
Residing in the Borough of Richmond,
N. Y. County Clerk's No. 185,
N. Y. County Register's No. 21110.

Term Expires July 1, 1921.

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## Opinion.

LAW JOURNAL, DECEMBER 3, 1920.

By Mr. Justice Finch.

*Matter of Appleby and ano.* v. *Hulbert, &c.*—No matter how complete a grant of power was made by the Legislature of the State of New York to the City of New York, yet when the city made the grant to the father of the petitioners it was expressly upon permission being obtained from the
197 city before structures could be erected. Petitioners contend that the meaning of this condition is not as expressed, but seek to whittle down the same. They give, however, no sufficient reason. On the other hand, the inaction by the grantees for almost two generations makes against petitioners' contention. Such a construction as petitioners contend for would permit petitioners to speculate during the time of the passing of generations to await any turn of circumstances which would afford large profits at the city's expense without incurring any proportionate risk. This shows a lack of equity which bears against the
198 construction contended for by petitioners. Motion denied. Settle order on notice.

199

## Stipulation.

SUPREME COURT,

NEW YORK COUNTY.

IN THE MATTER

*of*

The Application of EDGAR S. APPLEBY and JOHN S. APPLEBY, for a peremptory writ of mandamus 200

*against*

MURRAY HULBERT as Commissioner of Docks of The City of New York.

IT IS HEREBY STIPULATED AND CONSENTED:

That the words "year 1890" in the sixth paragraph of the Petition herein be changed to "year 1871." 201

That the denials of paragraphs 23, 24 and 37 of the Petition be withdrawn and said paragraphs admitted.

The denial of the following allegations in paragraph 36 is withdrawn and the following allegations are admitted:

That from time to time, the City of New York, acting through the Commissioner of Docks or the Commissioner of Docks and Ferries has built piers in West 39th Street, West 40th Street and

202 West 41st Street, Borough of Manhattan, New York City, and has leased the sides of said piers and has dredged the petitioner's lands under water adjacent thereto.

Dated, New York, September 20, 1920.

BANTON MOORE,
Attorney for Petitioners.

JOHN P. O'BRIEN,
Corporation Counsel.

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STIPULATION WAIVING CERTIFICATION

SUPREME COURT, NEW YORK COUNTY

In the Matter of the Application of EDGAR S. APPLEBY and JOHN S. APPLEBY for a Peremptory Writ of Mandamus against MURRAY HULBERT, as Commissioner of Docks of the City of New York.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the order appealed from, and all the papers upon which said order was made, and the whole thereof, now on file in the office of the Clerk of the County of New York, and certification thereof pursuant to Section 1353 of the Code of Civil Procedure is hereby waived.

Dated, New York, March —, 1922.

Banton Moore, Attorney for Appellants. John P. O'Brien, Corporation Counsel.

ORDER OF APPELLATE DIVISION

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department, in the County of New York, on the 27th Day of April, 1922.

Present: Hon. John Proctor Clarke, P. J.; Frank C. Laughlin, Walter Lloyd Smith, Alfred R. Page, Edgar S. K. Merrill, Justices.

In the Matter of EDGAR S. APPLEBY and JOHN S. APPLEBY for a Peremptory Writ of Mandamus, Relators, against JOHN T. DELANEY, as Commissioner of Docks of the City of New York, Defendant.

Upon the annexed waiver of notice of resettlement and on motion of Banton Moore, attorney for relators, it is

Ordered that the order in the proceeding entitled "In the Matter of Edgar S. Appleby and John S. Appleby, for a peremptory writ of mandamus, against Murray Hulbert as Commissioner of Docks of the City of New York," dated the 20th day of January, 1922 and entered and filed in the office of the Clerk of the Appellate Division of the Supreme Court, First Department, on or about the 3d day of March, 1922, be and the same hereby is resettled by substituting John T. Delaney as Commissioner of Docks of the City of New York, as defendant in this proceeding, in place and stead of Murray Hulbert as Commissioner of Docks of the City of New York, so as to read as follows:

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department, in the County of New York, on the 20th Day of January, 1922

Present: Hon. John Proctor Clarke, P. J.; Frank C. Laughlin, Walter Lloyd Smith, Alfred R. Page, Edgar S. K. Merrill, Justices.

No. 6584

In the Matter of EDGAR S. APPLEBY and JOHN S. APPLEBY for a Peremptory Writ of Mandamus vs. JOHN T. DELANEY, as Commissioner of Docks of the City of New York

An appeal having been taken to this court by the relators, Edgar S. Appleby and John S. Appleby, from an order of the Supreme Court, New York County, entered on the 29th day of September, 1920, denying the application of Edgar S. Appleby and John S. Appleby, for a peremptory writ of mandamus directed to the Commissioner of Docks, requiring him forwith to issue to the said relators a permit to improve their property according to a plan or plans annexed to the petition, and said appeal having been argued by Mr. Spotswood D. Bowers, of counsel for the relators, and by Charles J. Nehrbas, Assistant Corporation Counsel, of counsel for the respondent, and due deliberation having been had thereon, it is unanimously

Ordered, that the said order appealed from be and the same is hereby reversed without costs, and the motion herein is granted without costs. And it is further

Ordered, that thirty days after entry and service of this order, a peremptory writ of Mandamus issue out of and under the seal of this Court, directed to the Commissioner of Docks, requiring him forthwith to issue to the relators, Edgar S. Appleby and John S. Appleby, a certificate or written authority permitting them to improve their property mentioned and described in the petition, in the manner set forth by either Plans Nos. 1 or 2 in the petition set forth herein as the same may be modified by the Commissioner of Docks with a view to safeguarding the public interests, if the same shall be found to be necessary, unless within that time an appropriate proceeding shall have been instituted by or on behalf of the City of New York, to acquire title to the property, and property rights of the applicants necessary to deprive them of their existing right to construct, maintain and use a bulkhead on the bulkhead line as established by the approval of the Secretary of War in 1890, and to confine and limit them to the construction, maintenance and use of a bulkhead on the bulkhead line established by the Commissioner of Docks and approved by the Commissioners of the Sinking Fund in 1916, and if the City desires to construct and maintain a public marginal street or wharf between 12th Avenue and the said bulkhead line of 1916, as shown on the diagram accompanying the establishment thereof, then and in that event also to acquire the property and property rights of the applicants incidental thereto, and if the city desires not only to construct and maintain such a marginal street or wharf, but also to cut off the wharfage and the cranage rights of the applicants to wharfage or cranage on or at the bulkhead between 39th and 40th Streets and 40th and 41st Streets, then and in that event also to acquire title to the property and property rights of the applicants required for that purpose; and in the event of the institution by or on behalf of the City of such a proceeding within such

time the issuance of the mandamus order shall be deemed stayed for a reasonable time to enable the City to acquire the necessary property and property rights of the applicants.

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### Defendant's Notice of Appeal to Court of Appeals

New York Supreme Court, County of New York

In the Matter of Edgar S. Appleby and John S. Appleby for a Peremptory Writ of Mandamus, Relators-Respondent, against John T. Delaney, as Commissioner of Docks of the City of New York, Defendant-Appellant

Sir:

Please take notice that the defendant in the above-entitled proceeding hereby appeals to the Court of Appals of the State of New York from the order of the Appellate Division of the Supreme Court, First Department, dated the 20th day of January, 1922, and entered and filed in the office of the Clerk of said Appellate Division on or about the 3rd day of March, 1922, as resettled by the order herein, dated the 27th day of April, 1922, and entered and filed in the office of the Clerk of said Appellate Division on or about the same date, and a certified copy thereof filed in the office of the Clerk of the County of New York on or about the 29th day of April, 1922, which said order grants relators' motion for a peremptory writ of mandamus, and the said defendant appeals from each and every part of said order, as well as from the whole thereof.

Dated, New York, May 2, 1922.

Yours, etc., John P. O'Brien, Corporation Counsel, Attorney for Defendant-Appellant, Office and P. O. Address, Municipal Building, Borough of Manhattan, New York City.

To Banton Moore, Esq., Atty. for Relators-Respondents, 110 William St., Borough of Manhattan, New York City.

To William F. Schneider, Esq., County Clerk, New York County.

### Relator's Notice of Appeal to Court of Appeals

New York Supreme Court

In the Matter of Edgar S. Appleby and John S. Appleby for a Peremptory Writ of Mandamus, Relators-Respondents, against John T. Delaney, as Commissioner of Docks of the City of New York, Defendant-Appellant

Sirs:

Please Take Notice that the applicants, Edgar S. Appleby and John S. Appleby, hereby appeal to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Department, dated the 20th day of January,

1922, and entered and filed in the office of the Clerk of said Appellate Division on or about the 3rd day of March, 1922, as resettled by the order herein, dated the 27th day of April, 1922, and entered and filed in the office of the Clerk of said Appellate Division on or about the same date, and a certified copy thereof filed in the office of the Clerk of the County of New York on or about the 29th day of April, 1922 in so far as said order limits the applicants' right to a peremptory writ of mandamus unless the City of New York should immediately acquire title to the property of the applicants, and said applicants appeal from each and every part of said order.

Dated, New York, May 3, 1922.

Yours, &c., Banton Moore, Attorney for Relators-Respondents. Office & P. O. Address, 110 William Street, Borough of Manhattan, City of New York.

To John P. O'Brien, Esq., Corporation Counsel, Municipal Building, City of New York; William F. Schneider, Esq., Clerk of the County of New York.

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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, JUNE, 1916

John Proctor Clarke, P. J.; Frank C. Laughlin, Walter Lloyd Smith, Alfred R. Page, Edgar S. K. Merrell, Justices

No. 6584

In the Matter of EDGAR S. APPLEBY and JOHN S. APPLEBY for a Peremptory Writ of Mandamus vs. MURRAY HULBERT, as Commissioner of Docks of the City of New York

OPINION OF APPELLATE DIVISION

Appeal by petitioner from an order of the Supreme Court, New York County, at special term, denying their application for a peremptory writ of mandamus to compel the commissioner of docks to issue to them a permit for filling in land under water and the construction of a bulkhead

Spottswood D. Bowers (Banton Moore, Attorney) for Appellants.
Charles J. Nehrbas (John P. O'Brien, Corporation Counsel) for Respondent.

LAUGHLIN, J.:

The permit which appellants desired is with respect to the premises involved in the suit in equity brought by them against the City and others, in which their appeal from the judgment therein was argued and is to be decided herewith. The material facts with respect to the rights of the petitioners are stated in the opinion in that action and neeed not be restated here. The petition herein shows that on

the 5th of December, 1919, the petitioners presented to the Commissioner of Docks plans for the construction of a bulkhead on the bulkhead line established pursuant to the provisions of Chapter 574 of the Laws of 1871, and approved by the Secretary of War in 1890. One of these plans was for a solid filling from the bulkhead as then maintained by the appellants a little easterly of the easterly line of 12th Avenue, to said bulkhead line as so established. The other plan was for the construction of the bulkhead and an approach thereto covering the entire surface over the lands of the appellants between 39th and 40th Streets and 40th and 41st streets and the bulkhead as so then maintained by the appellant and the bulkhead line as so established, but provided that such construction should be on piles without filling. The application was in the alternative for the approval of one or the other of the plans and for a permit for construction in accordance therewith. It was denied on the ground that it was not in accordance with the new bulkhead line established in 1916, but no other objection to the proposed plans was made by the Commissioner. One of the proposed plans contemplated the filling in of 12th Avenue between 39th and 40th streets and 40th and 41st streets solid to the level of the surface of those streets as they now exist continued westerly as piers and the pavement of the surface with granite blocks; and the other plan contemplated the construction of such surfaces with granite block pavement resting on piles. We are deciding in the action that the fee to 12th Avenue is in the city. The original grants of the land under water between these streets, under which the petitioners claim, obligated the grantees when required by the Mayor, Board of Aldermen, and the Commonalty of the city or their successors, at their own proper costs and charges, to build, erect, make, and finish, or cause to be built, erected, made, and finished, bulkheads, wharves, streets, or avenues within the lines of 12th and 13th Avenues and 39th, 40th and 41st Streets in so far as the same were embraced within the exterior boundary lines of the grants, which embraced 12th and 13th Avenues between the center lines of 39th and 41st Streets and the three streets between those lines and the easterly line of 12th Avenue and the westerly line of 13th Avenue. The streets within those boundaries have already been made as piers, as stated in our opinion in the action, but the avenues within those boundaries have not been filled in nor made. By the original grants, the grantees and their successors were precluded from filling in or making the streets and avenues until permission therefor should be obtained from the Mayor, Board of Aldermen, and the Commonalty of the City or their successors, and also precluded them from building or erecting any wharf or pier or other obstruction in the Hudson River in front of the premises granted, without like permission. The bulkhead line, as established in 1916, crosses the premises granted by the original grants between 12th and 13th Avenues, somewhat nearer 12th than 13th Avenue. We are deciding in the action that the rights of the appellant are not limited or restricted by this bulkhead line, but only by the bulkhead line which has been approved by the Secretary of war. They have, we think, an absolute right to fill in from the

land granted by the same grants easterly of 12th Avenue, which has been filled in, to that bulkhead line, for it was fairly contemplated by the grants that they were to have free and unrestricted access to the bulkhead or wharf from all of the lands granted which might lie easterly of the bulkhead line when lawfully established, in order that they might enjoy the wharfage and cranage rights granted to them in consideration of the money paid by them and obligations to build bulkheads and to make and continue in repair the streets and avenues within the exterior boundaries of the grants; and of such rights they can be deprived only by a voluntary relinquishment thereof, or by the exercise of the right of eminent domain, and making to them just compensation therefor (Langdon v. Mayor, 93 N. Y. 128; Williams v. Mayor, 105 N. Y. 419; Matter of Commissioner of Public Works, 135 App. Div. 561, aff'd 199 N. Y. 531). The exercise by the appellants of the right to construct the bulkhead, not on 13th Avenue, as originally contemplated, but upon their own land, where the bulkhead line has been lawfully established as to them, however, is subject to the approval of the Commissioner of Docks, who, under the statute, has succeeded to the jurisdiction and functions of the Mayor, Board of Aldermen, and Commonalty of the City in the premises. Since no objection was made by the Commissioner of Docks to the alternative plans for this improvement presented by the appellants, and there has been extensive litigation between the parties, which should be brought to an end, the order should be reversed and the motion for a peremptory writ of mandamus, requiring the respondent to issue a permit to the appellants based on one or the other of the proposed plans, as the same may be modified by him with a view to safeguarding the public interests, should be granted; but if the Commissioner of Docks deems it necessary that the bulkhead and wharf should be built on the bulkhead line so established in 1916, the City should be afforded an opportunity to acquire the property and property rights of the plaintiffs essential to have the improvements conform to that bulkhead line.

It follows that the order should be reversed without costs, and motion granted without costs; but it will be provided in the order that the writ shall not be issued for thirty days, and if within that time, an appropriate condemnation proceeding shall be instituted to acquire the property and property rights of the relators, then the issuance of the writ shall be suspended for a reasonable time to enable the City to acquire such property and property rights, but otherwise the writ will be issued at the expiration of 30 days.

All Concur.

At a Special Term, Part II, of the Supreme Court Held in and for the County of New York, at the County Court House, in said County, on the 19th Day of April, 1922

Present: Hon. Daniel F. Cohalan, Justice.

In the Matter of EDGAR S. APPLEBY and JOHN S. APPLEBY for a Peremptory Writ of Mandamus, Petitioners, against MURRAY HULBERT, as Commissioner of Dockets of the City of New York, Respondent.

ORDER OF SUBSTITUTION

Upon the annexed waiver of notice of settlement and on motion of Banton Moore, attorney for petitioners, it is

Ordered that John T. Delaney as Commissioner of Docks of the City of New York be and he hereby is substituted as defendant in this proceeding in place and stead of Murray Hulbert, as Commissioner of Docks of the City of New York.

Enter.

D. F. C., J. S. C.

Notice of settlement of the foregoing order is hereby waived.
Dated, New York, April 19, 1922.

(S.) Banton Moore, Attorney for Petitioners. (S.) John P. O'Brien, Corporation Counsel, Attorney for Respondent.

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STIPULATION WAIVING CERTIFICATION

It is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal, the order appealed from, the opinions of the Court and all the papers upon which the Court below acted in making the order appealed from, and the whole thereof, now on file in the office of the Clerk of the County of New York.

Certification thereof in pursuance of Sections 577, 616 and 170, 1553 of the Civil Practice Act is hereby waived.

Dated, New York, June 10, 1922.

John P. O'Brien, Corporation Counsel, Attorney for Respondent, the City of New York. Banton Moore, Attorney for Appellants Appleby.

Compared & Correct undertaking given. J. M. J. S. C.

CLERK'S CERTIFICATE

STATE OF NEW YORK,
County of New York, ss:

Clerk's Office of the Supreme Court of the State of New York for the County of New York

I, James A. Donegan, Clerk of the County of New York and of the Supreme Court of the State of New York for the said County of New York, by virtue of the annexed Writ of Error which was served upon me on the 24 day of August, 1923, and in obedience thereto, do hereby certify that the foregoing pages numbers from 1 to 84 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the Edgar S. Appleby and *vs.* John H. Delaney, et al. mentioned in said Writ of Error, as the same remain of record and on file in my office;

And that annexed hereto is the Petition for the said Writ of Error, the Assignment of Errors and Prayer for Reversal, Bond on Reversal, the Citation to the Defendants in error with admission of service of the same and said Writ of Error served upon me.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed and have hereunto set my hand, at my office in the City and County of New York, the 30 day of August, 1923.

—— ——, Clerk. (New York Seal.)

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STATE OF NEW YORK, ss:

COURT OF APPEALS

State Reporter's Office

REPORTER'S CERTIFICATE

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of In the Matter of the Application of Edgar S. Appleby, et al., for a Peremptory Writ of Mandamus, Appellants and Respondents, v. John H. Delaney, as Commissioner of Docks of the City of New York, Respondent and Appellant, decided by the Court of Appeals on the seventeenth day of April, 1923, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this sixth day of September, 1923.

J. Newton Fiero, As Reporter of the Court of Appeals of the State of New York. Attest: R. M. Barber, Clerk of the Court of Appeals. [Seal of the State of New York Court of Appeals.]

State of New York:

Court of Appeals

Chief Justice's Certificate

I, Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that Richard M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of In the Matter of the Application of Edgar S. Appleby et al., for a Peremptory Writ of Mandamus, Appellants and Respondents, v. John H. Delaney, as Commissioner of Docks of the City of New York, Respondent and Appellant, decided by the said Court of Appeals on the 17th day of April, 1923, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of Richard M. Barber, as clerk of said court, appended thereto is the true and genuine signature of said Richard M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall, in the City of Albany and State of New York, on the 12 day of September in the year one thousand nine hundred and twenty-three.

Frank H. Hiscock, As Chief Judge of the Court of Appeals of the State of New York.

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In the Court of Appeals

[Title omitted]

(Decided April 17, 1923)

Opinion

Cross-Appeals from order of appellate division, first department, reversing an order of special term which denied plaintiffs' motion for a peremptory mandamus requiring the defendant to approve certain dock plans and granting the application

Banton Moore for relators, appellants and respondents.

John P. O'Brien, Corporation Counsel (Charles H. Nehrbas of counsel), for defendant, respondent and appellant.

POUND, J.:

Relators seek to compel the commissioner of docks to approve permits for the filling in of lands under water.

The facts herein are substantially the same as in Appleby v. City of New York, decided herewith, with this difference: The city established a new bulkhead line in 1916, which crosses the premises granted between Twelfth and Thirteenth avenues. It was held in the action that the rights of the relators are not limited by this bulkhead line but only by the bulkhead line established by the secretary of war. The court below decided herein that a writ of peremptory mandamus should issue unless condemnation proceedings were instituted to acquire relators' property and property rights within such line. (199 App. Div. 552.)

We held in the action that the title of relators to lands actually under water is subject to the rights of the city to improve the same for the purposes of navigation but that the city must re-acquire the property right in the land under water which it has conveyed before it can carry out its plans for such improvement.

This application should not, however, be granted. Section 15 of title 4 of the sinking fund ordinance of 1844, referred to in the opinion in the action, provides:

"No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity therewith, without permission to do so is first had and obtained from the common council."

The water grants under which relators hold title also provide:

"And it is hereby further covenanted and agreed, by and between the parties to these presents, and the true intent and meaning hereof is that the said party of the second part, his heirs and assigns will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had and obtained from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part or their successors or assigns first had for that purpose."

In Duryea v. Mayor, etc. (62 N. Y. 592) it was said that a similar clause did not limit the right of the owners to fill the space between the streets, but on a subsequent appeal (Duryea v. Mayor, etc., 96 N. Y. 477) it was said that the provisions of the sinking fund ordinance had not been called to the court's attention on the first appeal and it was held that the council had given its consent. We are free to interpret the clause according to its meaning. To construe the ordinance and the grants as permitting the filling of the land between the streets at the will of the grantee and as prohibiting the building of the wharves and streets without the consent of the common coun-

cil would be unreasonable. The lands are thus held subject to the conditions of the grant and may not be filled in without the approval of the city authorities. The power to grant permission to construct bulkheads or piers and to make land in conformity with relators' grants implies the right to withhold such permission.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in this court and in the Appellate Division.

Hiscock, Ch. J., Hogan, Cardozo, McLaughlin, Crane and Andrews, JJ., concur.

Ordered accordingly.

## In the Supreme Court of the United States

[Title omitted]

### Petition for Writ of Error

To the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York:

And now come Edgar S. Appleby and John S. Appleby, plaintiffs in error and petitioners, and represent that on June 4, 1923 an order of the Court of Appeals was made and entered June 13th, 1923 denying said petitioners motion for reargument of this proceeding and the order of said Court of Appeals made and entered on April 17, 1923, which reversed an order of the Appellate Division of the Supreme Court herein with costs, dated April 27, 1922 and duly entered, and which order of said Appellate Division reversed an order of the Supreme Court, New York County, dated and entered December 11, 1920, which last mentioned order denied "as a matter of right and not in the exercise of discretion, with $10 costs," said petitioners' application for a peremptory writ of mandamus to the Commissioner of Docks of the City of New York to compel him to approve certain plans submitted to him by petitioners for the improvement of their submerged lands inside the Federal harbor lines.

That this proceeding was for a writ of mandamus as aforesaid. That the said petitioners were and are the owners of two certain blocks of land under water in the Borough of Manhattan, City of New York between Twelfth and Thirteenth Avenue, one block between West 39th and West 40th Streets, and the other block between West 40th and West 41st Streets. That the Secretary of War pursuant to the River and Harbor Act of 1890 established a bulkhead line across said property 150 feet west of and parallel with said Twelfth Avenue, and a pierhead line about 350 feet west of said property and 700 feet west of and parallel with the bulkhead line.

That the petitioners desired to improve that portion of their property inside the Federal bulkhead line and applied to the said Commissioner of Docks to approve certain plans and for a permit to do the work. Said Commissioner made no objections to plans from a struc-

tural or safety point of view but denied said application "on account of the fact that the proposed construction is not in accordance with the new plan" (fol. 104) of the City of New York for the improvement of the water front.

As a defense to the application for said writ of mandamus, the said Commissioner of Docks filed an affidavit which denied certain allegations of the petitioners and alleged that he was "without power to grant such application, for the reason that the carrying out thereof would be in violation of law" (fol. 193).

No other defense to said application was made except and until the argument in the Court of Appeals, when the Corporation Counsel, Attorney for said Commissioner, urged that Section 15 of Article 4 of the Sinking Fund Ordinance of 1844 and the deeds under which petitioners claim title provided that the lands "may not be filled in without the approval of the City authorities." 235 N. Y. 364, 367.

And your petitioners aver that in their said petition they expressly charged that if the adoption of "the amended new plan, so called be construed as impairing, interfering with or destroying petitioners' property or rights they are and were invalid as violating, first Article I, Section 10, Part I, of the Constitution of the United States, by impairing the obligation of a contract; second in violation of Articles V and XIV (Section 1) of the additions to and amendments of the Constitution of the United States, and Article 1, Section 6, of the Constitution of the State of New York, by depriving the petitioners or their predecessors in title of their property or rights without due process of law and taking their property for public use, without just compensation" (fols. 30-31).

That in this writ your petitioners claimed to be the absolute owners of the property sought to be improved, with the title, right, privilege and immunity under the Sections of the Constitution of the United States, aforesaid, and the Act of Congress, known as the River and Harbor Act of 1890, as amended by Act of March 3, 1899 (30 Stat. 1151-1155), and the right to improve their property at their pleasure; that, notwithstanding these facts, the said Court of Appeals decided against the title, right, privilege and immunity thus specifically set up and claimed by the petitioners. And petitioners respectfully allege that the said orders of the Court of Appeals and the interpretation of the said Ordinance of 1844 and the deeds herein, were and are repugnant to the Constitution and Laws of the United States.

And your petitioners further aver that in the aforesaid order and proceedings certain errors were committed to the prejudice of your petitioners, all of which will more fully appear from the assignment of errors, which is filed herewith.

Wherefore, your petitioners pray that a writ of error from the Supreme Court of the United States may issue in this proceeding to the Court of Appeals of the State of New York, or the Clerk of the Supreme Court, New York County, who now has custody of the record, for the correction of errors so complained of and that a transcript of record, proceedings and papers in this cause duly authenticated

by the Clerk of the Supreme Court, New York County, may be sent to the Supreme Court of the United States as provided by law.

Dated, August 15, 1923.

Banton Moore, Attorney for Petitioners and Plaintiffs in Error.

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IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes Edgar S. Appleby and John S. Appleby, petitioners and plaintiffs in error, by Banton Moore, their attorney, and in connection with their petition for a writ of error show that in the record and proceeding and in the rendering of the decision of the Court of Appeals in the above entitled proceeding manifest error has intervened to the prejudice of petitioners and plaintiffs in error in this, to-wit:

First. That the Court erred in construing Section 15, of Title 4 of the Sinking Fund Ordinance of 1844, which has not been pleaded, and should not have been read on argument, so as to deprive petitioners of their property and rights without due process of law and without compensation. That according to the facts and the established rule of law and the judgment in the action of Appleby vs. The City of New York, et al., 235 N. Y. 351, said petitioners have property and property rights for which they are entitled to the protection of the Federal and State Constitution and Laws, and that the ruling of the Court of Appeals herein is erroneous and partly beyond and partly against the Federal Act and authority and in favor of State Act and authority, so that it intervenes petitioners' constitutional rights, by taking their property without compensation and without due process of law, and by depriving them of equal protection of the laws, and by violating the obligation of their contract.

Second. That there is a conflict of decisions upon an important question of law. That the present ruling is erroneous and based upon a city ordinance not in the record and which should not have been read on argument.

Third. That the Court has overlooked an important fact in this proceeding, admitted by stipulation, to wit: that the City has constructed piers in the streets (fol. 201) which would have, under the judgment made in the case of Appleby vs. City of New York, required a different final order to that made herein.

Fourth. That the Court erred in construing the language of the grant, contrary to all its previous decisions, which constituted a sale of property, upon which petitioners relied, and which power said

court cannot exercise, and which error caused the Court to make the final order which was made herein.

Fifth. That by reason of the said rulings and arbitrary action and power of the City authorities, the petitioners are forever deprived without compensation in violation of Article I, Section 10, Part 1 of the Constitution of the United States, by violating the obligation of their contract, and Article XIV, Section 1 of the amendments to the Constitution, and of Article I, Section 6 of the Constitution of the State of New York, by depriving petitioners of their property and property rights, and the sum of $74,426.01 in taxes paid said City, without due process of law and taking their property without compensation.

Sixth. That the ruling herein of said Court changes the established law, which constituted a rule of property, upon which petitioners and their predecessors in title relied in the payments aforesaid to said City for said deeds and said taxes, and thereby takes away their said property and rights acquired by contract and which comes under the protection of the Constitution of the United States as aforesaid.

By reason whereof, these petitioners and plaintiffs in error pray that the said final order of the Court of Appeals may be reversed and that the motion be granted unless the City of New York desires to acquire the property to legalize its appropriation, in which event the writ of mandamus be stayed for a reasonable time to permit the said City to do so.

Dated, New York, August 15th, 1923.

Banton Moore, Attorney for Petitioners and Plaintiffs in Error.

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COURT OF APPEALS OF THE STATE OF NEW YORK

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

On reading the petition of Edgar S. Appleby and John S. Appleby, for writ of error and the assignment of errors, and upon due consideration of the record of said cause;

It is ordered, That a writ of error be allowed from the Supreme Court of the United States to the Court of Appeals of the State of New York, as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law, upon condition that the said petitioners and plaintiffs in error give security in the sum of One thousand Dollars ($1,000), that the said plaintiffs in error shall prosecute said writ of error to effect, and if said plaintiffs in error fail to make their plea good, shall answer to the de-

fendants in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiffs in error now presenting a bond in the sum of One thousand Dollars ($1,000.) with the National Surety Company, as surety, it is Ordered that the same be and hereby is dull approved.

In witness whereof, I have hereunto set my hand this 17 day of August, 1923.

Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York.

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Bond on Writ of Error [For $1,000.00; filed and approved Aug. 17, 1923; omitted in printing]

Citation

United States of America, ss:

To George P. Nicholson, Esq., Corporation Counsel, Atty. for and the Commissioner of Docks, of the City of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date of the service of this citation, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court, New York County, wherein Edgar S. Appleby and John S. Appleby are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the order rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the hand and seal of the Honorable, the Chief Justice of the Court of Appeals of the State of New York, this 17 day of August, in the year of our Lord one thousand nine hundred and twenty-three.

Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York. Attest: R. M. Barber, Clerk of the Court of Appeals of the State of New York. (Seal of Court of Appeals, State of New York.)

Writ of Error

United States of America, ss:

The President of the United States of America to the Honorable the Justices of the Court of Appeals of New York and the Clerk of the Supreme Court, New York County, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said matter before you or

some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between Edgar S. Appleby and John S. Appleby, and John H. Delaney, as Commissioner of Docks of the City of New York, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity and wherein was drawn in question the validity of a State statute or of an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of such their validity, and wherein in a title, right, privilege or immunity was claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under such Constitution, treaty, statute, commission or authority, the manifest error hath happened to the great damage of the said Edgar S. Appleby and John S. Appleby as by their petition appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this appeal, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof. That the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the 21st day of August, in the year of our Lord, One Thousand, Nine Hundred and Twenty-three.

Alex Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York. (Seal of the District Court of the United States.)

Allowed by Hon. Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York.

Frank H. Hiscock, Chief Judge Court of Appeals, State of New York.

A copy of the within paper has been this day received at the Office of the Corporation Counsel.

Aug. 24, 1923.

George P. Nicholson, Corporation Counsel.

[File endorsement omitted.]

At a Special Term of the Supreme Court, Part II Thereof, Held in and for the County of New York, at the County Court House, on the — Day of August, 1923.

Present: Honorable Wiliam Harmon Black, Justice.

[Title omitted]

Order Transmitting Record

Upon reading the annexed affidavit of Banton Moore, verified August 28th, 1923, and upon the writ of error herein allowed by the Chief Judge of the Court of Appeals and issued by the Clerk of the District Court of the United States for the Southern District of New York, dated August 17th, 1923, now, on motion of Banton Moore, attorney for the plaintiffs, it is

Ordered that the order of the Court of Appeals be and the same hereby is made the order of this Court and that the Clerk of this Court transmit to the Clerk of the Supreme Court of the United States, the original writ of error and papers annexed, except the original bond, which he shall keep in his files together with a copy of said writ of error and papers annexed, as required by law.

Enter.

No. 583

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1923.

In the Matter

of

EDGAR S. APPLEBY and JOHN S. APPLEBY, for a peremptory writ of mandamus,

*Petitioners,*

—against—

JOHN T. DELANEY, as Commissioner of Docks of The City of New York,

*Respondents.*

# PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

**Conflicting decisions. Change of state law, a rule of property, upon which petitioners and their predecessors relied. Taking of property without compensation, impairment of obligation of contract and denial of equal protection of the law. Ruling, upon assumed facts without evidence to support same, and contrary to admitted facts. Important questions affecting title to and rights in submerged lands.**

BANTON MOORE,
*Attorney for Petitioners.*

CHARLES HENRY BUTLER,
*Counsel for Petitioners.*

# INDEX.

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1923.

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In the Matter

of

EDGAR S. APPLEBY and JOHN S. APPLEBY, for a peremptory writ of mandamus,

Petitioners,

—against—

JOHN T. DELANEY, as Commissioner of Docks of The City of New York,

Respondents.

---

*Sir*:

PLEASE TAKE NOTICE, that at the opening of the Supreme Court of the United States on Monday, October 1, 1923 (or as soon thereafter as counsel can be heard), I shall present to the Court the annexed petition for a writ of certiorari to review a decision and decree of the Court of Appeals of the State of New York, and the orders entered thereupon in the above entitled proceeding, a copy of such petition, and brief in support thereof, being hereby served upon you.

New York, August 25, 1923.

BANTON MOORE,
Attorney for Petitioners,
110 William Street,
New York, N. Y.

To:

GEORGE P. NICHOLSON, ESQ.,
Corporation Counsel,
Attorney for City of New York.

IN THE

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1923.

---

In the Matter

of

EDGAR S. APPLEBY and JOHN S. APPLEBY, for a peremptory writ of mandamus,

Petitioners,

—against—

JOHN T. DELANEY, as Commissioner of Docks of The City of New York,

Respondents.

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## Petition of plaintiffs for a writ of certiorari to review a decision of the Court of Appeals of the State of New York.

*To the Honorable the Supreme Court of the United States:*

I. The facts in this proceeding are the same as in *Applyby* v. *City*, herewith submitted. This cause arose in Special Term of Supreme Court, New York County, upon an application for peremptory writ of mandamus. The order of Special Term, denying the writ (fols. 7-11) was reversed and writ granted by the Appellate Division of the Supreme Court (fol. 215). The Court of Appeals by final order reversed the Appellate Division and affirmed the order of Special Term, and denied an application for reargument.

II. The Court of Appeals affirmed the judgment of the Appellate Division in the action of *Appleby* v. *City of New York*, which held that

petitioners could fill in and improve that portion of their property herein involved, at their pleasure, and without the consent of the City of New York (Par. 28 of Judgment, fol. 1652 of Record in said case). In this proceeding the said Court on the same day and upon the same state of facts, holds the opposite (235 N. Y. 364 at p. 376), basing its decision upon a supposed city ordinance not in evidence, but hereinafter referred to, which was claimed to prevent petitioners from using their property until permitted by the common council. The ruling was made as a matter of right and not in the exercise of discretion (fol. 11). An application for a rehearing was denied June 4, 1923, by order entered June 13, 1923.

III. The ruling herein is not only contrary to the said judgment, but is contrary to a line of cases in the said Court of Appeals, construing the same clause in like deeds from the City, which cases established a rule of property upon which petitioners and their predecessors in title relied.

IV. That the said change of law impairs the obligation of their contract, takes their property rights without compensation, and confiscates the money paid for the deeds and taxes.

V. That petitioners are successors of "all the right and title of the people of the state" (Ch. 182 of Laws of 1837) to "certain water lot(s) or vacant ground and soil under water to be made land" (fols. 111, 140), and entitled to improve their property. The ruling herein to the contrary is of broad public interest, certainly in the State of New York, if not in other states, and is very vital to the ownership of the property involved herein.

VI. That petitioners prepared plans to fill in their property inside the Federal bulkhead line of 1890, 150 feet west of and parallel with 12th Avenue, and of course inside the bulkhead line shown in their deeds, and applied to the Commissioner of Docks for approval of the plans and a permit to do the work. However, the City had adopted a plan for improvement of the property itself and contemplated acquiring title thereto to carry out said plan, which, as amended in 1916, provided that the bulkhead line should be only 50 feet west of 12th Avenue or 100 feet inshore of the Federal line.

The said Commissioner denied the application "on account of the fact that the proposed construction is not in accordance with the new plan" (fol. 104), and opposed this proceeding on the ground that he was "without power to grant such application, for the reason that the carrying out thereof would be in violation of law" (fol. 193).

This defense was overruled by the Appellate Division and by the Court of Appeals which held "that the rights of the relators (petitioners) are not limited by this bulkhead line (City line of 1916) but only by the line established by the Secretary of War." 235 N. Y. 364, 365.

As petitioners' proposed improvement is entirely consistent with Federal harbor lines and as the aforesaid defense was overruled, the application should have been granted.

But the City cited an obsolete ordinance in its Court of Appeals brief, which had not been pleaded and should not have been read on argument. And said Court, contrary to the facts of the case and contrary to the settled law, set forth in the annexed brief, held that the petitioners'

lands "may not be filled in without the approval of the City authorities."

VII. The Court of Appeals ruling is unreasonable, impairs a contract, intervenes petitioners' constitutional rights, and amounts to a taking without compensation.

VIII. For the reasons set forth in said brief, your petitioners submit that the Court of Appeals ruling is contrary to law. Although a writ of error has been granted herein, petitioners are advised by counsel to present this petition out of greater caution, and pray in the alternative, either (1) that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Clerk of the Supreme Court, New York County, commanding him to certify and send to this Court on a day certain to be designated in the writ, a full and complete transcript of the record and of all proceedings of said Court of Appeals of the State of New York in this proceeding, to the end that the same may be reviewed and determined in this Court as provided in Section 237 of the Act of Congress known as the Judicial Code, and the said final decree of the said Court of Appeals in this proceeding and every part thereof may be reversed by this Honorable Court and the proceeding remanded with directions to grant the application prayed for in the petition, or (2) that consideration of this petition be deferred until the hearing on the writ of error; and your petitioners pray for such other and further relief as may be just and equitable.

Dated, August 25, 1923.

EDGAR S. APPLEBY and
JOHN S. APPLEBY,
Petitioners.

CHARLES HENRY BUTLER,
Counsel for Petitioner.

State of New York,
County of New York—ss.:

EDGAR S. APPLEBY being duly sworn, says: That he is one of the petitioners herein, united in interest and pleading together with said John S. Appleby, the other petitioner. That he has read the foregoing petition, and that the same is true and correct to the best of his knowledge, information and belief.

EDGAR S. APPLEBY.

Sworn to before me this
25th day of August, 1923.

AUGUST A. FINK,
Notary Public, Kings Co. No. 96.
New York Co. Clerk's No. 226.
Term expires March 30, 1924.

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I, CHARLES HENRY BUTLER, attorney and counselor at law duly admitted to practice in this Court do hereby certify that I have examined the foregoing petition for writ of certiorari; that although a writ of error has been allowed, the true scope and extent of the authority therefore is doubtful, rendering the petition for certiorari necessary for the proper protection of my clients' rights in the premises; that the petition is not made for delay, but is meritorious and well founded in law and ought therefore be granted.

Dated, August 25, 1923.

CHARLES HENRY BUTLER,
Counsel for Petitioners.

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1923.

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In the Matter

of

EDGAR S. APPLEBY and JOHN S. APPLEBY, for a peremptory writ of mandamus,

Petitioners,

—against—

JOHN T. DELANEY, as Commissioner of Docks of The City of New York,

Respondents.

---

## *BRIEF IN SUPPORT OF PETITION.*

### I. Obligation of contract impaired by conflicting decisions and change of State law.

The State of New York by Ch. 182 of the Laws of 1837 (Schedule E) (1) established 13th Avenue as the "permanent" exterior avenue along the Hudson River, (2) extended and established all interior streets out to 13th Avenue, (3) vested in the City of New York "all the right and title of the people" of the State to the lands under water inside said permanent ripa, and (4) gave the riparian owners the pre-emptive right of grant from the City.

Said act has been held constitutional and a proper exercise of State power.

Said act formed an integral part of the contract expressed in the two deeds (Schedules F & G), from said City to petitioners' predecessors in title. The deeds are similar to other deeds from said City along the Hudson River. The object of the deeds was to raise money and to

improve the water front, the shore line being irregular and separated from the channel by tide water flats.

The deeds gave specific rights which the Court now says were withheld by an ordinance. It is unreasonable to assume that money would be paid for property which could not be enjoyed except by permission.

The deeds dated 1852 and 1853, respectively, set forth a consideration of $6,369.37 (fol. 110) and $4,937.50 respectively and conveyed "All that certain water lot or vacant ground and soil under water to be made land" etc. bounded and described by metes and bounds along said *established* streets, with certain wharfage rights, etc. The land in the streets was reserved for highway purposes forever and the wharfage at the *end* of the streets, to wit, the westerly side of 13th Avenue, was excepted.

The deeds contained mutual covenants, particularly that the grantee would build or erect the streets and avenues when requested, or permitted, but there are no covenants as to making the lands or improving the intervening spaces between the streets and avenues, that is, the lands conveyed. So held in *Duryea* v. *Mayor*, 62 N. Y. 592, same case 96 N. Y. 477, which has always been considered as conclusively settling the law on the question, as shown by later cases citing it with approval, such as *Mayor* v. *Law*, 125 N. Y. 380, at page 390 and again at page 391 where the Court said:

> "The grantee became the absolute owner of the land between the streets—the land granted, and that he could fill up whenever he chose, suiting his own pleasure as to the time and manner of doing it, but there was nothing in the grant binding him to fill it up. *Duryea* v. *Mayor, supra.*"

The Court passed upon identical language in the deed in the *American Ice Company* cases, and held that piers in streets could be rendered worthless as piers at any time "by the filling in of the land as far westerly as Thirteenth Avenue." 193 N. Y. 503, at p. 519, 217 N. Y. 402, at p. 420.

Therefore, "the Court is" not "free to interpret the clause" contrary to previous interpretations aforesaid, which were according to its true meaning and reasonable. The power of the Court of Appeals to change or modify its decisions "cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States," *Muhlker* v. *N. Y. & Harlem R. R. Co.*, 197 U. S. 544, 570.

The petitioners have such rights, affirmed by said previous decisions, which are clearly binding on the Court.

In the *Duryea* case (62 N. Y. 592) the Court of Appeals determined that there were no conditions in the deed as to the making of the lands between the streets, and affirmed this doctrine in same case, 96 N. Y. 477, where the Court further said that the deed "purported to give immediate possession of the property conveyed" (p. 486) and that the covenant as to making land applied only to streets, wharves and avenues, and not to the "intermediate spaces between the several streets and avenues therein described" (p. 488) and also said as to the Sinking Fund Ordinance of 1844 that a later "ordinance (1856) purports to establish a map, plan and new exterior water

line on its *easterly* side for the City of New York" and that the avenues and "streets be continued" * * * "by a prolongation of the lines of such avenues and streets" (p. 489). This is on all fours with the present case, except that by Ch. 182 of the Laws of 1837, the Legislature (which is a paramount to the Sinking Fund or Common Council (p. 489), established the map and water line, and directed that the streets and avenues be "continued," "by prolongation," on the *westerly* side of the City, instead of the easterly side. The City ordinance could not override the mandate of the legislature and it was not as intended.

The Court in the *Duryea* case, 96 N. Y. 477, further said that it could not adopt terms which "lead to manifest injustice and involve an absurdity" (bottom of p. 495), but would give "effect to the language used as will accomplish the obvious intent," and that "if it *be held* that the words 'make lands in conformity thereto' as used in the ordinance, apply *only* to the lands necessary to form the piers, bulkheads and streets, the defendant will not only be protected in all of the rights intended to be secured to it, but the grantee will receive the benefits of his purchase and the deed will be free from objection on account of the apparent repugnancy existing between the interests actually conveyed and those apparently reserved," and that the City's contention is "inconceivable" etc. (p. 496).

There can be no mistake as to this clear ruling in 96 N. Y. 477, or its continued repetition and affirmance in the later cases aforesaid. *Mayor v. Law*, 125 N. Y. 380; *Matter of City of New York*, 193 N. Y. 503, 519; *American Ice Co. v. City of New York*, 217 N. Y. 402, 420.

The Court was bound therefore to adhere to the "reasonable" interpretation of said clause

according to its "true meaning" which does not lead to "injustice" and "involve an absurdity," because petitioners and their predecessors relied thereon, in payment for deeds and $74,426.01 in taxes upon the property involved herein.

The City must have understood the true meaning of the clause, else it would not have ignored it in the lower courts.

The property and rights acquired by the deeds and confirmed by the courts come under the protection of Article I, Section 10, Part 1, of the Constitution of the United States, known as the contract clause, and the XIVth Amendment of the Constitution, against taking property without due process of law or without compensation and affording equal protection of the laws (fol. 30).

## II. The ruling is based on assumed facts without evidence to support same, and is contrary to admitted facts.

In reference to Section 15 of Title 4 of the Sinking Fund Ordinance of 1811, the Court assumed

1. that the ordinance had been pleaded and was still in force;
2. that it is correctly quoted;
3. that it effected the land granted;
4. that it is paramount to the Legislature;
5. that no permission was given or waived;
6. that the streets have *not* been constructed.

First: the ordinance is not pleaded. It was not before the Court. "It is entirely plain that the" City ordinance "cannot, upon any legal ground, be read upon the argument." *Porter* v. *Waring*, 69 N. Y. 250, 256.

Sections 11 and 17 are as material as Section 15, if the ordinance is material at all. The "common council" referred to no longer exists. The Croton Water debt may be redeemed. The ordinance may no longer be in force (Section 5, Ch. 225, Laws of 1845).

Second: the text in the Court's opinion herein, differs from that in 96 N. Y. 486, and is incorrect. "Therewith" is different from "thereto." Also a reading of the entire ordinance with this correction would have prevented the misinterpretation.

Third: the ordinance did not effect the land granted as shown in all previous rulings of said Court (Point I), which in equity cases, without a jury, constitute a finding of fact, which this Court will review. *Jones National Bank* v. *Yates*, 240 U. S. 541; *Interstate Amusement Co.* v. *Albert*, 239 U. S. 560.

Fourth: the Legislature is paramount to the Sinking Fund Commission. The Legislature directed that the streets be "established, continued and extended." Ch. 182 of the Laws of 1837. This "legislative command" has been construed by the Court as an "immediate application of such lands for that purpose." *Knickerbocker Ice Co.* v. *42nd St. Ry. Co.*, 176 N. Y. 408; *Duryea* cases, *supra*, and many others

Fifth: (a) "Permission" was given by express words in the deed which purported to give immediate possession.

(b) Permission was also waived by the City usurping the grantee's right to build the streets

and erecting them itself upon piles. It is stipulated that the City has built piers in the streets (fol. 201). Such are pier streets according to the contract in the deeds and the decisions of the Court of Appeals. *City of Buffalo* v. *D., L. & W. R. R. Co.*, 190 N. Y. 84, 89.

(c) There is no evidence that any one ever applied for permission in like case. On the contrary the City has watched the filling going on for a century without ever making protest. *Furman* v. *Mayor*, 5 Sand (N. Y.) 16 aff. 10 N. Y. 567; *Langdon* v. *Mayor*, 93 N. Y. 129; *Williams* v. *Mayor*, 105 N. Y. 418, and many others.

Sixth: The streets have been constructed as aforesaid. If, as the Court says herein (235 N. Y. at p. 267) "The interest of both parties, as well as the general public require that the building of streets and the filling of lands should proceed simultaneously," then the application should be granted, because petitioners' plan and of improving their property is precisely the same as the pier streets which are stipulated to have been constructed (fol. 201).

## CONCLUSION.

By reason of the errors and rulings aforesaid:

1. petitioners' contract with the City of New York, based on Ch. 182 of the Laws of 1837, set forth in the deeds, confirmed by many decisions of highest authority upon which they relied, has been violated in direct contravention of Article I, Section 10, Part 1 of the Constitution of the United States, known as the contract clause of the Constitution, and

2. their property and property rights are taken without compensation, including the sum of $74,426.01 paid to said City for taxes, all in direct violation of the XIVth amendment of the Constitution of the United States.

That the retaking by the City is directly for the purpose of greater monetary gain, as is shown by the City's use of the petitioners' property for slips and basins, under a definite plan, from which it receives great revenue, which petitioners alleged in their petition, violates their constitutional rights (fols. 30-31).

WHEREFORE, petitioners pray in the alternative:

(1) that a writ of certiorari issue forthwith: or

(2) that as a writ of error has been granted herein, that the consideration of this petition be deferred until the hearing on the error.

Dated, August 20, 1923.

Respectfully submitted,

BAXTON MOORE,
*Attorney for Petitioners,*
Office & P. O. Address,
110 William Street,
Borough of Manhattan,
City of New York.

CHARLES HENRY BUTLER, ESQ.,
*Of Counsel for Petitioners.*

# APPENDIX.

## Opinion of the Court of Appeal per Mr. Justice Pound.

In the Matter of the Application of EDGAR S. APPLEBY, *et al.*, for a Peremptory Writ of Mandamus, Appellants and Respondents, against JOHN H. DELANEY, as Commissioner of Docks of the City of New York, Respondent and Appellant.

CROSS-APPEALS from order of Appellate Division, First Department, reversing an order of Special Term which denied plaintiffs' motion for a peremptory mandamus requiring the defendant to approve certain dock plans and granting the application.

BANTON MOORE, for Relators, Appellants and Respondents.

JOHN P. O'BRIEN, Corporation Counsel (Charles H. Nehrbas, of counsel), for Defendant, Respondent and Appellant.

POUND, *J.*:

Relators seek to compel the commissioner of docks to approve permits for the filling in of lands under water.

The facts herein are substantially the same as in *Appleby* v. *City of New York*, decided herewith, with this difference: The city established a new bulkhead line in 1916, which crosses the premises granted between Twelfth and Thirteenth

Avenues. It was held in the action that the rights of the relators are not limited by this bulkhead line but only by the bulkhead line established by the Secretary of War. The court below decided herein that a writ of peremptory mandamus should issue unless condemnation proceedings were instituted to acquire relators' property and property rights within such line. (199 App. Div. 552.)

We held in the action that the title of relators to lands actually under water is subject to the rights of the city to improve the same for the purposes of navigation but that the city must reacquire the property rights which it has conveyed before it can carry out its plans for such improvement.

This application should not, however, be granted. Section 15 of Title 4 of the sinking fund ordinance of 1844, referred to in the opinion in the action, provides:

> "No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity therewith, without permission to do so is first had and obtained from the common council."

The water grants under which relators hold title also provide:

> "And it is hereby further covenanted and agreed, by and between the parties to these presents, and the true intent and meaning hereof is that the said party of the second part, his heirs and assigns will

not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had and obtained from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part or their successors or assigns first had for that purpose."

In *Duryea* v. *Mayor, etc.* (62 N. Y. 592), it was said that a similar clause did not limit the right of the owners to fill the space between the streets, but on a subsequent appeal (*Duryea* v. *Mayor, etc.*, 96 N. Y. 477), it was said that the provisions of the sinking fund ordinance had not been called to the Court's attention on the first appeal and it was held that the council had given its consent. We are free to interpret the clause according to its meaning. To construe the ordinance and the grants as permitting the filling of the land between the streets at the will of the grantee and as prohibiting the building of the wharves and streets without the consent of the common council would be unreasonable. The interest of both parties, as well as of the general public, requires that the building of the streets and the filling of the lands should proceed simultaneously, otherwise the filled in lands would be islands intersected by canals. The lands are

thus held subject to the conditions of the grant and may not be filled in without the approval of the city authorities. The power to grant permission to construct bulkheads or piers, and to make land in conformity with relators grants implies the right to withhold such permission.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in this Court and in the Appellate Division.

Hiscock, Ch. J., Hogan, Cardozo, McLaughlin, Crane and Andrews, J. J., concur.

Order accordingly.

(3)



IN THE

# Supreme Court of the United States.

October Term, 1925.

No. 16.

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EDGAR S. APPLEBY and JOHN S. APPLEBY,
*Plaintiffs in Error,*

—against—

JOHN T. DELANEY, as Commissioner of Docks of the City of New York,
*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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## *BRIEF FOR PLAINTIFFS IN ERROR.*

The brief for plaintiffs in error in this proceeding is contained in the brief in the case of EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and as executors, etc., vs. THE CITY OF NEW YORK, argued herewith.

CHARLES E. HUGHES,
BANTON MOORE,
*Of Counsel.*

# Supreme Court of the United States

In the Matter

of

EDGAR S. APPLEBY and JOHN S. APPLEBY,

Petitioners,

For a Writ of Mandamus,

against

JOHN H. DELANEY, as Commissioner of Docks of the City of New York.

**Brief in opposition to petition for Writ of Certiorari.**

## STATEMENT.

(References are made to the Record before the Court of Appeals of the State of New York).

This case grows out of the case of *Appleby* vs. *The City of New York et al*, submitted herewith. The property involved and the petitioners are the same in both cases.

After the decision in *Appleby* vs. *The City of New York* by the court of first instance, the petitioners applied to the commissioner of docks of the City of New York, who had jurisdiction over such matters, for a permit to fill in the areas between the present line of solid filling and the bulkhead line established by the Secretary of War in 1890. The commissioner of docks refused the permit on the ground that a bulkhead line had been established by the State authorities 100 feet farther inshore than the line of the Secretary of War (fols. 194-195; see map opposite p. 59). It was his contention that no filling beyond the State's new bulkhead line could properly be made.

The Court of Appeals of New York has held in this case that the dock commissioner was wrong in his interpretation of the effect of the State's bulkhead line. Judge Pound, writing for the Court, said:

> "The City established a new bulkhead line in 1916, which crosses the premises granted between Twelfth and Thirtenth Avenues. It was held in the action that the rights of the relators are not limited by this bulkhead line but only by the bulkhead line established by the Secretary of War." 235 N. Y., p. 365.

The Court held, however, that permission to fill was properly refused, for the reason that the ordinance of the City of New York which authorize the grants to petitioners' predecessors provided:

"No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity therewith, without permission to do so is first had and obtained from the common council."

It was not claimed that the petitioners had obtained the consent of the common council or its successor in authority. Without such consent, the Court held, the petitioners could not fill any portion of the lands granted.

## POINT I.

## No Federal question is involved.

It seems plain that the decision of the Court of Appeals of New York was not based on any act of legislation of the State of New York passed subsequent to the grants in question. The decision was purely one of the construction, meaning, and intention of the grants. It has many times been held that the provision of the constitution with respect to impairment of contract refers to impairment *by an act of legislation* and not by judicial decision.

> *Ross* vs. *Oregon*, 227 U. S. 150, 161;
> *Moore-Mansfield Co.* vs. *Electrical Install. Co.*, 234 U. S. 619, 624 to 625;
> *Cleveland, Pittburgh R. Co.* vs. *Cleveland*, 235 U. S. 50.

Furthermore, there has been no change in decision by the State Courts. The petitioners claim that the Court of Appeals has overruled

its prior decision in *Duryea* vs. *The Mayor* 96 N. Y. 477. The *Duryea* case was twice before the Court of Appeals. Upon the first appeal (62 N. Y. 592) the Court had before it a grant similar to those made to petitioners' predecessors. The Court construed this grant without reference to the provisons of the ordinance above referred to, the ordinance not having been called to the Court's attention. On the basis of the language of the grant alone, the Court held that the permission of the common council was not required to enable the grantee to fill in *the spaces between the streets.*

Upon the second appeal (96 N. Y. 477), the ordinance authorizing the grants was before the Court. The Court recognized the proposition that, if there was any difference between the provision of the ordinance and that of the grant, the ordinance must prevail, as that was the authority under which the grant was made. Two questions were then considered; first, whether the common council had in fact consented to the filling of the lands; and second, the effect of the ordinance. The Court squarely held (96 N. Y. pp. 493, 498), that the common council had consented to the filling of the space between the streets, and that the ordinance had thus been complied with. This, of course, made the question of the effect of the limitation contained in the ordinance more or less academic. The Court proceeded to discuss the question, however, and stated among other things:

> "It may very well be doubted whether the construction formerly given by this Court

> to the covenants contained in the deed should not also be deemed applicable to the provision of the sinking fund ordinance." (96 N. Y. p. 494).

The point, however, was not definitely passed upon, for, in stating its final conclusions, at page 498, the Court did not refer to it.

Judge Pound, therefore, was clearly right in the case at bar when, referring to the ordinance, he stated:

> "We are free to interpret the clause according to its meaning. To construe the ordinance and the grants as permitting the filling of the land between the streets at the will of the grantee and as prohibiting the building of the wharves and streets without the consent of the common council would be unreasonable. The lands are thus held subject to the conditions of the grant and may not be filled in without the approval of the city authorities. The power to grant permission to construct bulkheads or piers and to make land in conformity with relators' grants implies the right to withhold such permission." 235 N. Y., at page 367.

With respect to the failure to plead the ordinance upon which the Court relied, it is the law of New York that Courts sitting in the City of New York must take judicial notice of city ordinances.

> *People ex rel. Broadway Co.* vs. *Waldron* 183 N. Y. App. Div. 807.

While the Court of Appeals does not sit in the City of New York, still, in reviewing decisions of Courts in that City, it must, of course, consider all that the Courts below were required to consider. Furthermore, the ordinance in question was ratified and made non-repealable by an act of the legislature (Chapter 225 of the Laws of New York of 1845, Section 5) of which the Court could take notice. This act provided as follows:

> "Section 5: The ordinance now in force and approved of by the mayor of said city on the twenty-second day of February, 1844, and any ordinance that may hereafter be passed by the said the mayor, aldermen and commonalty of the city of New York, in conformity with the provisions of this law, and relative to the said sinking fund, shall not be amended without the consent of the legislature first had and obtained, except by setting apart and appropriating to and for the purposes of said sinking fund additional revenue whenever the said the mayor, aldermen and commonalty shall deem proper; and the said ordinance shall remain in full force until the whole of the debt created for the introduction of the croton water into the city of New York shall be fully redeemed."

The other suggested errors in the decision of the Court of Appeals are likewise merely questions of local law.

*The petition for the writ of certiorari herein should be denied.*

New York, September , 1923.

Respectfully submitted,

GEORGE P. NICHOLSON,
Corporation Counsel.
Atorney for The City of New York.

CHARLES J. NEHRBAS,
of Counsel.

(15)



(20176)

# Supreme Court of the United States

OCTOBER TERM, 1925—No. 16.

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EDGAR S. APPLEBY and JOHN S. APPLEBY,
*Plaintiffs-in-error,*

*against*

JOHN H. DELANEY, as Commissioner of Docks of The City of New York,
*Defendant-in-error.*

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## BRIEF ON BEHALF OF DEFENDANT-IN-ERROR.

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GEORGE P. NICHOLSON,
*Corporation Counsel.*

CHARLES J. NEHRBAS,
*Of Counsel.*

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

# Supreme Court of the United States

No. 16

October Term, 1925.

EDGAR S. APPLEBY and JOHN S. APPLEBY,
Plaintiffs-in-Error,

*against*

JOHN H. DELANEY, as Commissioner of Docks of the City of New York,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

## BRIEF ON BEHALF OF THE DEFENDANT-IN-ERROR.

In addition to the writ of error, the plaintiffs-in-error filed, at the October 1923 term, a petition for a writ of certiorari. The Court deferred consideration of such petition until the hearing upon the writ of error.

The plaintiffs-in-error seek to review a final order of the New York Supreme Court (R., p. a) entered after the reversal by the Court of Appeals of New York (R., pp. b to c) of an order of an intermediate appellate tribunal (R., pp. 69

to 71), which in turn had reversed a final order of the Special Term of the Supreme Court (R., pp. 3 to 4).

The final order sought to be reviewed denies an application of the plaintiffs-in-error for a writ of mandamus.

## Statement of the Case.

This case grows out of the case of *Appleby* v. *City of New York* (No. 15, October Term, 1925) to be argued herewith. The plaintiffs-in-error and the property involved are the same in both cases.

After the decision in *Appleby* v. *The City of New York* by the court of first instance, the plaintiffs applied to the commissioner of docks of the City of New York, who had jurisdiction over such matters, for a permit to fill in the areas between the present line of solid filling and the bulkhead line established by the Secretary of War in 1890 (R., pp. 24-34). The commissioner of docks refused the permit on the ground that a bulkhead line had been established by the State authorities 100 feet farther inshore than the line of the Secretary of War (R., pp. 64, 65) (see map, p. 58). It was his contention that no filling beyond the State's new bulkhead line could properly be made.

The Court of Appeals of New York has held in this case that the dock commissioner was wrong in his interpretation of the effect of the State's bulkhead line. Judge Pound, writing for the Court, said:

> "The City established a new bulkhead line in 1916, which crosses the premises granted between Twelfth and Thirteenth Avenues. It was held in the

> action that the rights of the relators are not limited by this bulkhead line but only by the bulkhead line established by the Secretary of War." 235 N. Y., p. 365.

This determination apparently proceeded on the theory that the establishment of a bulkhead line by the Secretary of War was an act of paramount authority which prevented any inconsistent regulation by the authorities of the state.

The Court held, however, that permission to fill was properly refused, for the reason that the ordinance of the City of New York which authorized the grants to plaintiffs' predecessors provided:

> "No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity therewith, without permission to do so is first had and obtained from the common council."

It was not claimed that the plaintiffs had obtained the consent of the common council or its successor in authority. Without such consent, the Court held, the plaintiffs could not fill any portion of the lands granted.

## POINT I.

### No Federal question is involved.

It seems plain that the decision of the Court of Appeals of New York was not based on any act of legislation of the State of New York passed subsequent to the grants in question. The decision was purely one of the construction, meaning, and intention of the grants. It has many times

been held that the provision of the constitution with respect to impairment of contract refers to impairment *by an act of legislation* and not by judicial decision.

> *Ross* vs. *Oregon*, 227 U. S. 150, 161;
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> *Cleveland, Pittsburgh R. Co.* vs. *Cleveland*, 235 U. S. 50.

Furthermore there has been no change in decision by the State Courts. The plaintiffs claim that the Court of Appeals has overruled its prior decision in *Duryea* vs. *The Mayor*, 96 N. Y. 477. The *Duryea* case was twice before the Court of Appeals. Upon the first appeal (62 N. Y. 592) the Court had before it a grant similar to those made to plaintiffs' predecessors. The Court construed this grant without reference to the provisions of the ordinance above referred to, the ordinance not having been called to the Court's attention. On the basis of the language of the grant alone, the Court held that the permission of the common council was not required to enable the grantee to fill in *the spaces between the streets*.

Upon the second appeal (96 N. Y. 477), the ordinance authorizing the grants was before the Court. The Court recognized the proposition that, if there was any difference between the provision of the ordinance and that of the grant, the ordinance must prevail, as that was the authority under which the grant was made. Two questions were then considered; first, whether the common council had in fact consented to the filling of the lands; and second, the effect of the ordinance. The Court squarely held (96 N. Y., pp. 493, 498), that the common council had consented to the filling of the space between the streets, and that the

ordinance had thus been complied with. This, of course, made the question of the effect of the limitation contained in the ordinance more or less academic. The Court proceeded to discuss the question, however, and stated among other things:

> "It may very well be doubted whether the construction formerly given by this Court to the covenants contained in the deed should not also be deemed applicable to the provision of the sinking fund ordinance" (96 N. Y., p. 494).

The point, however, was not definitely passed upon, for, in stating its final conclusions, at page 498, the Court did not refer to it.

Judge Pound, therefore, was clearly right in the case at bar when, referring to the ordinance, he stated:

> "We are free to interpret the clause according to its meaning. To construe the ordinance and the grants as permitting the filling of the land between the streets at the will of the grantee and as prohibiting the building of the wharves and streets without the consent of the common council would be unreasonable. The lands are thus held subject to the conditions of the grant and may not be filled in without the approval of the city authorities. The power to grant permission to construct bulkheads or piers and to make land in conformity with relators' grants implies the right to withhold such permission." 235 N. Y., at page 367.

With respect to the failure to plead the ordinance upon which the Court relied, it is the law of New York that Courts sitting in the City of New York must take judicial notice of city ordinances.

*People ex rel. Broadway Co.* vs. *Waldron*, 183 N. Y. App. Div. 807.

While the Court of Appeals does not sit in the City of New York, still, in reviewing decisions of Courts in that City, it must, of course, consider all that the Courts below were required to consider. Furthermore, the ordinance in question was ratified and made non-repealable by an act of the legislature (Chapter 225 of the Laws of New York of 1845, Section 5) of which the Court could take notice. This act provided as follows:

> "Section 5: The ordinance now in force and approved of by the mayor of said city on the twenty-second day of February, 1844, and any ordinance that may hereafter be passed by the said the mayor, aldermen and commonalty of the city of New York, in conformity with the provisions of this law, and relative to the said sinking fund, shall not be amended without the consent of the legislature first had and obtained, except by setting apart and appropriating to and for the purposes of said sinking fund additional revenue whenever the said the mayor, aldermen and commonalty shall deem proper; and the said ordinance shall remain in full force until the whole of the debt created for the introduction of the croton water into the city of New York shall be fully redeemed."

The other suggested errors in the decision of the Court of Appeals are likewise merely questions of local law.

**The final order should be affirmed.**

New York, October, 1925.

Respectfully submitted,

GEORGE P. NICHOLSON,
*Corporation Counsel.*

CHARLES J. NEHRBAS,
*Of Counsel.*

(5656)

(16)



# Supreme Court of the United States,

OCTOBER TERM, 1925—No. 16.

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EDGAR S. APPLEBY and JOHN S. APPLEBY,
*Plaintiffs in error,*

*against*

JOHN H. DELANEY, as Commissioner of Docks of The City of New York,
*Defendant in error.*

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## BRIEF FOR DEFENDANT IN ERROR ON REARGUMENT.

---

CHARLES J. NEHRBAS,
*Counsel for Defendant in error.*

(20282) Stillman Appellatte Printing Co.

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LISTS OF CASES AND STATUTES CITED.

# Supreme Court,

OF THE UNITED STATES,

OCTOBER TERM, 1925—No. 16.

EDGAR S. APPLEBY and JOHN S. APPLEBY,
Plaintiffs in error,

against

JOHN H. DELANEY, as Commissioner of Docks of the City of New York,
Defendant in error.

**IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.**

(Reported below, 235 N. Y., 364; 199 N. Y., App. Div., 552.)

## BRIEF FOR DEFENDANT IN ERROR ON REARGUMENT.

This case was argued before the Court on October 7, 1925, and, on November 16, 1925, the Court directed that it be restored to the docket for reargument.

The plaintiffs in error seek to review a final order of the New York Supreme Court (R., p. a.) entered after the reversal by the Court of Appeals of New York (R., pp. b to c) of an order of an intermediate appellate tribunal (R., pp. 69 to 71), which in turn had reversed a final order of the Special Term of the Supreme Court (R., pp. 3 to 4.)

The final order sought to be reviewed denies an application of the plaintiffs in error for a writ of mandamus.

## Statement of the Case.

This case grows out of the case of *Appleby vs. City of New York* (No. 15, October Term, 1925) to be argued herewith. The plaintiffs in error and the property involved are the same in both cases.

After the decision in *Appleby vs. The City of New York* by the Court of first instance, the plaintiffs applied to the commissioner of docks of the City of New York, who had jurisdiction over such matters, for a permit to fill in the areas between the present line of solid filling and the bulkhead line established by the Secretary of War in 1890 (R., pp. 24-34). It does not appear that they offered to build the streets.

The commissioner of docks refused the permit on the ground that a bulkhead line had been established, in 1916, by the State authorities 100 feet farther inshore than the line of the Secretary of War (R., pp. 64, 65) (see map, p. 58). It was his contention that no filling beyond the State's new bulkhead line could properly be made.

The plaintiffs then presented a petition (R., pp. 7 to 63) to the Supreme Court of New York for the issuance of a writ of mandamus, requiring the dock commissioner to issue to them a permit to

improve the property in the manner set forth in their application to the commissioner.

An affidavit of the commissioner was submitted in opposition to plaintiffs' petition (R., pp. 64-65).

The court of first instance (the Special Term of the Supreme Court) denied the plaintiffs' motion (R., pp. 3 to 4). The plaintiffs appealed to the Appellate Division of the Supreme Court, and upon this appeal the order of the court below was reversed, and the writ of mandamus was directed to issue (R., pp. 69-70). The commissioner then appealed to the Court of Appeals, which court reversed the order of the Appellate Division, and affirmed the order of the Special Term (R., pp. b to c). Upon the remittitur of the Court of Appeals, an order was entered at the Special Term of the Supreme Court (R., pp. a to b) which finally determined the proceeding, and which is the order sought to be reviewed.

The Court of Appeals has held in this case that the dock commissioner was wrong in his interpretation of the effect of the State's bulkhead line. Judge Pound, writing for the Court, said:

> "The City established a new bulkhead line in 1916, which crosses the premises granted between Twelfth and Thirteenth Avenues. It was held in the action that the rights of the relators are not limited by this bulkhead line but only by the bulkhead line established by the Secretary of War." 235 N. Y., p. 365.

This determination apparently proceeded on the theory that the establishment of a bulkhead line by the Secretary of War was an act of paramount authority which prevented any inconsistent regulation by the authorities of the State.

Compare

*Peo. vs. Hudson River Connecting R. R. Co.*, 228 N. Y., 203.

The court held, however, that permission to fill was properly refused, for the reason that the ordinance of the City of New York, adopted in 1844, which authorized the grants to plaintiffs' predecessors, provided:

> "No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity therewith, without permission to do so is first had and obtained from the common council."

It is not claimed that the plaintiffs have obtained the consent of the common council to the making of the lands in question, nor, indeed, that they have so much as applied to the common council for such permission. It was for that reason, and for that reason only, that the plaintiffs were denied the relief they sought.

## POINT I.

### No Federal question is involved.

It seems plain that the decision of the Court of Appeals of New York was not based on any act of legislation of the State of New York passed subsequently to the grants in question. The decision was purely one of the construction, meaning, and intention of the grants. It has many times been

held that the provision of the constitution with respect to impairment of contract refers to impairment *by an act of legislation* and not by judicial decision.

*Ross vs. Oregon*, 227 U. S., 150, 161;
*Moore-Mansfield Co. vs. Electrical Install. Co.*, 234 U. S., 619, 624 to 625;
*Cleveland, Pittsburgh R. Co. vs. Cleveland*, 235 U. S., 50;
*Tidal Oil Co. vs. Flanagan*, 263 U. S., 444;
*Fleming vs. Fleming*, 264 U. S., 29.

It is not true, as claimed by the plaintiffs, that the New York courts have given effect to the limitation attempted to be provided by the new bulkhead line of 1916. On the contrary, the Court of Appeals has expressly held that the rights of the plaintiffs are not limited by that line. The sole ground of the decision is that the grants from the City to the plaintiffs' predecessors in title, construed in the light of the ordinance pursuant to which they were made, required the permission of the common council of the City of New York before any filling could be done.

The plaintiffs claim that the Court of Appeals has overruled its prior decision in *Duryea vs. The Mayor*, 96 N. Y., 477. The *Duryea* case was twice before the Court of Appeals. Upon the first appeal (62 N. Y., 592) the court had before it a grant similar to those made to plaintiffs' predecessors. The court construed this grant without reference to the provisions of the ordinance above referred to, the ordinance not having been called to the court's attention. On the basis of the language of the grant alone, the court held that the permission of

the common council was not required to enable the grantee to fill in *the spaces between the streets.*

Upon the second appeal (96 N. Y., 477), the ordinance authorizing the grants was before the court. The court recognized the proposition that, if there was any difference between the provision of the ordinance and that of the grant, the ordinance must prevail, as that was the authority under which the grant was made. Two questions were then considered; first, whether the common council had in fact consented to the filling of the lands; and second, the effect of the ordinance. The court squarely held (96 N. Y., pp. 493, 498), that the common council had consented to the filling of the space between the streets, and that the ordinance had thus been complied with. This, of course, made the question of the effect of the limitation contained in the ordinance more or less academic. The court proceeded to discuss the question, however, and stated among other things:

> "It may very well be doubted whether the construction formerly given by this Court to the covenants contained in the deed should not also be deemed applicable to the provision of the sinking fund ordinance" (96 N. Y., p. 494).

The point, however, was not definitely passed upon, for, in stating its final conclusions, at page 498, the court did not refer to it.

Judge Pound, therefore, was clearly right in the case at bar when, referring to the ordinance, he stated:

> "We are free to interpret the clause according to its meaning. To construe the ordinance

> and the grants as permitting the filling of the land between the streets at the will of the grantee and as prohibiting the building of the wharves and streets without the consent of the common council would be unreasonable. The lands are thus held subject to the conditions of the grant and may not be filled in without the approval of the city authorities. The power to grant permission to construct bulkheads or piers and to make land in conformity with relators' grants implies the right to withhold such permission." 235 N. Y., at page 367.

The plaintiffs concede that, under their grants, they have not the right to fill in and construct the streets without the consent of the common council. They asked the court, however, to hold that this limitation did not apply to the filling of the spaces between the streets. The court refused to accede to a proposition so absurd. If the plaintiffs were right, they might fill in the areas between the streets and thus construct islands which would be surrounded by canals. It is utterly unreasonable to suppose that the maker of the grants intended any such result.

It must be understood that the common council has not at any time refused its permission to the improvements sought to be made by the plaintiffs. No application for such permission has ever been made. The application to the commissioner of docks was not an application for the permission required by the grants and the ordinance. It cannot be determined what the attitude of the common council will be until the plaintiffs make formal application pursuant to the terms of the ordinance.

The questions relating to the conclusions of law made by the Appellate Division in *Appleby vs. The City of New York* (No. 15) and their effect upon the determination of this proceeding, have been discussed under Point V of the brief in No. 15.

**The final order should be affirmed.**

New York, January 27, 1926.

Respectfully submitted,

CHARLES J. NEHRBAS,
Counsel for defendnet in error.

# Supreme Court of the United States,

OCTOBER TERM, 1925—No. 15.

---

EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and as executors of Charles E. Appleby, deceased,
*Plaintiffs in error,*

*against*

THE CITY OF NEW YORK, *et al.*,
*Defendants in error.*

---

## BRIEF FOR DEFENDANTS IN ERROR ON REARGUMENT.

---

CHARLES J. NEHRBAS,
*Counsel for Defendants in error.*

(20282) Stillman Appellatte Printing Co.

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# Supreme Court,

OF THE UNITED STATES,

OCTOBER TERM, 1925—No. 15.

EDGAR S. APPLEBY and JOHN S. APPLEBY, Individually and as Executors of the Last Will and Testament of Charles E. Appleby, deceased,
Plaintiffs in error,

against

THE CITY OF NEW YORK, *et al.*,
Defendants in error.

**IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.**

(Reported below, 235 N. Y., 351; 199 N. Y. App. Div., 539).

## BRIEF FOR DEFENDANTS IN ERROR ON REARGUMENT.

This case was argued before the court on October 7, 1925, and, on November 16, 1925, the court directed that it be restored to the docket for reargument.

Plaintiffs in error seek to review a judgment of the Supreme Court of the State of New York (R., pp. 551-552) entered upon an order of the Appellate Division of that court (R., pp. 549-551). The judgment so entered has been affirmed by the Court of Appeals of New York (R., pp. b-c). The order of the Court of Appeals affirming the judgment below has been, according to the practice, made the order and judgment of the Supreme Court (R., pp. a-b).

The judgment sought to be reviewed modifies and affirms a judgment of the Special Term of the Supreme Court (R., pp. 201-203) and enjoins the defendants in error from interfering in certain particulars with the property of plaintiffs in error, but substantially denies the relief demanded in the complaint.

## Statement of the Case.

Plaintiffs in error, claiming to be the owners "in fee simple absolute" of certain lands under water between 39th and 40th Streets, and between 40th and 41st Streets, outshore of Twelfth Avenue, in the Borough of Manhattan, City of New York, brought this action,

(a) to restrain the defendants from mooring, docking or floating vessels over the lands under water, and from dredging:

(b) to require the removal of certain piers, sheds, etc., at the foots of 39th, 40th, and 41st Streets.

The plaintiffs also demand money damages (see Complaint, R., pp. 9-61).

The City of New York answered (R., pp. 62-84) denying the material allegations of the complaint, and setting up the establishment of harbor lines

affecting the premises in question, the statute of limitations, adverse possession, and the failure of the plaintiffs to comply with the conditions contained in their grants from the City.

The premises in question are under the waters of the Hudson River, on the westerly side of Manhattan Island.

By Chapter 182 of the Laws of New York of 1837, Thirteenth Avenue, as laid out on a certain map made by George B. Smith was declared to be the permanent exterior street or avenue in the City of New York, along the easterly shore of the Hudson River, between the southerly line of Hammond Street and the northerly line of 135th Street. The avenue was laid out beyond the shore line, over the waters of the river, and the City of New York was vested with all the right and title of the people of the State to the lands under water extending from the westerly line of the lands theretofore granted to the westerly line of Thirteenth Avenue as so laid out (R., pp. 172-174).

The title to the premises in question was thus vested in the City of New York. This is alleged in the complaint (R., pp. 12-13) and is not disputed.

On or about the 24th day of December, 1852, the City issued to one Robert Latou a water grant covering lands under water between Fortieth and Forty-first Streets from the high water mark of the Hudson River out to Thirteenth Avenue, established by Chapter 182 of the Laws of 1837 (Pltff.'s Ex. 5; R., pp. 378-387; Finding, R., pp. 182-191).

The grant contains the following pertinent provisions:

> "Saving and reserving from and out of the hereby granted premises so much thereof as by said map annexed forms parts or portions

of the Twelfth and Thirteenth Avenues and Fortieth and Forty-first Streets for the uses and purposes of public streets, avenues and highways as hereinafter mentioned" (R., p. 381).

"And the said party of the second part, for himself, his heirs and assigns, doth hereby covenant and agree to and with the said parties of the first part, their successors and assigns, that the said party of the second part, his heirs and assigns shall and will within three months next after he or they shall be thereunto required by the said parties of the first part, or their successors, at his or their own proper costs and charges build, erect, make and finish or cause to be built, erected, made and finished according to any resolution or ordinance of the said parties of the first part, or their successors, already passed or adopted, or that may hereafter be be passed or adopted, four good and sufficient Bulk-heads, Wharves, Streets or Avenues which shall form so much and such parts of the Twelfth and Thirteenth Avenues, and Fortieth and Forty-first Streets as fall within the limits of the premises first above described, and are reserved as aforesaid, from out thereof for public streets and will fill in the same with good and sufficient earth and regulate and pave the same and lay the sidewalks thereof" (R., pp. 381-382).

"And it is hereby further convenanted and agreed, by and between the parties to these presents, and the true intent and meaning hereof, is that the said party of the second part, his heirs and assigns will not build the said wharves, bulkheads, avenues or streets

herein before mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose" (R., p. 384).

"And it is hereby further agreed by and between the parties to these presents, and the true intent and meaning hereof, is that this present grant and every word or thing in the same contained shall not be construed or taken to be a covenant or covenants of warranty or seizen, of said parties of the first part or their successors or to operate further than to pass the estate right, title or interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several charters and the various acts of the Legislature of the People of the State of New York" (R., pp. 385-386).

Subsequently, on the first day of August, 1853, a similar grant was issued to Charles E. Appleby of the lands under water between Thirty-ninth and Fortieth Streets, from the high water mark out to Thirteenth Avenue (R., pp. 367-377; Finding, p. 191).

The title of the plaintiffs comes down from these grants (R., pp. 191-192).

The manifest purpose of these grants was to extend the shore line of the City to the westerly

side of Thirteenth Avenue. The grantees were to do all of the work of filling in and building bulkheads; they were also forever to maintain and keep in repair the streets and bulkheads (R., p. 382). This was the real consideration for the making of the grants. Upon completion of the work, the grantees were to be the owners of the lands between the streets. The beds of the streets were to be owned by the City of New York.

It was also provided that the grantees were to have the rights of wharfage, cranage, etc., appurtenant to the portion of the exterior line of the City opposite the premises granted, except that the City was to exercise such rights at the foots of the streets (R., p. 385). Rights of this character are commonly dominated bulkhead rights, and constitute a species of incorporeal hereditament.

See

*Matter of Pier 49, E. R.*, 185 N. Y., App. Div., 539, 543; 227 N. Y., 119.

The contemplated scheme of development was frustrated by the Secretary of War when, in 1890, acting under authority of Congress, he established a bulkhead line, or line of solid filling, parallel with and 150 feet to the west of the westerly line of Twelfth Avenue (R., p. 193), which is a considerable distance east of Thirteenth Avenue. The Secretary has also established a pierhead line 700 feet west of the bulkhead line. The pier line is beyond Thirteenth Avenue, and wholly outshore of the premises in controversy (R., p. 182; see map at p. 529).

Pursuant to the provisions of Section 6 of Chapter 574 of the laws of New York of 1871, certain officials, acting on behalf of the State of New York,

adopted a plan for the improvement of the waterfront at the locality in question, by which plan a bulkhead line or line of solid filling was established coincident with the bulkhead line of the Secretary of War (R., p. 193). The plan of the State authorities also provided for a pierhead line 500 feet beyond the bulkhead line, and for piers 80 feet in width at the foots of 39th, 40th and 41st Streets, extending from the bulkhead line to the pierhead line, and for slips or basins between the piers (Ex. 11, p. 391).

By the establishment of the bulkhead line, under authority of both the Federal and State governments, a limit was placed upon the extent to which anyone might place solid filling in the waters of the River, and by the adoption of the plan providing for the location and widths of the piers, a limit was placed upon the right to erect such structures.

The plaintiffs or their predecessors in title have made the streets and filled in the lands, as provided in the grants from the City, as far out as the easterly or inshore line of Twelfth Avenue (R., p. 177). The land so filled is not here in controversy. Beyond the easterly line of Twelfth Avenue, the land granted is still under water. The plaintiffs have done no filling beyond that line, nor have they built any part of Twelfth Avenue, Thirteenth Avenue nor the portions of the side streets between those avenues. The controversy deals with the lands thus left submerged.

The City of New York, at its own expense, has built piers at the foots of 39th, 40th and 41st Streets, as provided for in the plan heretofore referred to (R., pp. 180, 181, 192). The land under water covered by these piers was reserved from the grants made to plaintiffs' predecessors (R., pp. 368, 381). The City has leased these piers and its les-

sees have been mooring vessels at the sides of the piers over the plaintiffs' land under water (R., pp. 465-487). The City has also dredged the spaces between the piers to facilitate the navigation of vessels (R., p. 181). The floating of vessels over plaintiffs' land under water and the dredging of the slips constitute the injuries complained of.

In the court of original jurisdiction, the Special Term of the Supreme Court, the City was enjoined from dredging the slips and from doing other acts not now in controversy (R., p. 202). The opinion of the Special Term is printed at pages 356-362).

Both parties appealed to the Appellate Division of the Supreme Court, where the judgment was modified by eliminating the provision enjoining the City from dredging west of the established bulkhead line, and in all other respects affirmed (R., pp. 551-552). The opinion of the Appellate Division is printed at pages 555-563 and is reported in 199 N. Y. App. Div., 539.

Both parties again appealed to the Court of Appeals, where the judgment was affirmed (R., pp. b-c). The opinion of the Court of Appeals is printed at pp. 565-569 and is reported in 235 N. Y., 351.

Summarizing the situation, we find that the City of New York, deriving its title from the State, has granted to the plaintiffs' predecessors the land under water between 39th and 40th Streets, and between 40th and 41st Streets, and has reserved to itself the land under water within the prolonged lines of the streets. A bulkhead line has been established by concurrent action of the Federal and State authorities, which limits solid filling at a point 150 feet west of Twelfth Avenue. Beyond the bulkhead line, and within the pierhead line established by the Federal Government, the State has provided that piers shall be built only within

the prolonged lines of the streets. The State's regulation permits the building of piers on the City's property and prohibits the building of any structures on the plaintiffs' property beyond the bulkhead line. The City has built the piers on its property. The waters covering the plaintiffs' intervening property, beyond the bulkhead line, are part of the navigable waters of the river. The courts of New York have held that these waters may be navigated by vessels making fast to the City's piers, and may be dredged to facilitate navigation.

## POINT I.

**The acts of the State do not amount either to a taking of property or the impairment of the obligation of a contract.**

The courts of New York have held that the title of the City of New York and of its grantees to the land under the waters of Hudson River is not absolute and unqualified, but is subject to such regulations as the public authorities may impose respecting the use of the water front.

This has been the uniform course of adjudication upon this subject in the State of New York for many years. For example, in *Knickerbocker Ice Co. vs. 42nd St. R. R. Co.*, 176 N. Y., 408, the court wrote as follows:,

> "There are several fundamental facts which must be kept in view in the effort to adjust the rights of the parties to this litigation. *First:* The title of the City of New York in the tideway and submerged lands of the Hudson River granted under the Dongan and Montgomerie

charters and the acts of the legislatures of 1807, 1826 and 1837, was not absolute and unqualified, but was and is held subject to the right of the public to the use of the river as a water highway. (*Sage vs. Mayor, etc. of N. Y.*, 154 N. Y., 70; *Matter of City of N. Y.*, 168 N. Y., 139.) *Second:* The title of the City of New York in and to the lands within its public streets is held in trust for the public use. (*Story vs. N. Y. El. R. R. Co.*, 90 N. Y., 122; *Kane vs. N. Y. El. R. R. Co.*, 125 N. Y., 165). *Third:* The general public has a right of passage over the places where land highways and navigable waters meet; and when a wharf or bulkhead is built at the end of a land highway and into the adjacent waters, the highway is by operation of law extended by the length of the added structure. (*People vs. Lambier*, 5 Denio, 9; *Matter of City of Brooklyn*, 73 N. Y., 179). *Fourth:* It was competent for the legislature in granting additional submerged lands to the City of New York in 1837, to prescribe that such lands should be used for the purposes of an exterior street, to which other streets then intersecting the river should be extended."

176 N. Y., p. 417.

In

*American Ice Co. vs. City of New York*,
217 N. Y., 402,

the same property was involved as in the case of *Knickerbocker Ice Co.* (*supra*). The court's opinion contains the following discussion of the nature of the property rights in the land under water:

"A large number of the facts found relating to the title and interest of the City were reviewed by this court in the earlier cases (*Knickerbocker Ice Company vs. 42nd Street & G. St. F. R. R. Co.*, 176 N. Y., 408; *Matter of Mayor, etc. of N. Y.*, 195 N. Y., 503) wherein it was determined that the title of the City of New York in the tideway and the submerged lands of the Hudson River granted under the Dongan and Montgomerie charters and the acts of the legislature (Laws of 1807, chapter 115; Laws 1837, chapter 182), and by grants made by the State to the City was not absolute and unqualified, but was and is held subject to the rights of the public to the use of the river as a water highway; that the title of the City of New York in and to the lands within its public streets (including Forty-third Street to which the City acquired title in 1837-1838, and was opened from the East River to the high-water mark of the Hudson River, sixty feet in width), is held in trust for the public use; that the general public has a right of passage over the places where land, highways and navigable waters meet; and when a wharf or bulkhead is built at the end of a land highway and into the adjacent waters, the highway is, by operation of law, extended by the length of the added structure; that it was competent for the legislature in granting additional submerged lands to the City of New York in 1837 to prescribe that such lands should be used for the purposes of an exterior street to which other streets then intersecting the river should be extended. (*Knickerbocker Ice Company vs. 42nd Street & G. St. F. R. R. Co.*, 176 N. Y., 408, 417)."

217 N. Y., pp. 405, 406.

> "The title of the State to the seacoast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has been frequently said that a trust is engrafted upon this title for the benefit of the public of which the State is powerless to divest itself."
>
> *Core vs. State*, 144 N. Y., at pp. 405-406.

Moreover, the case at bar finds an exact precedent in *People vs. N. Y. & S. I. Ferry Co.*, 68 N. Y., 71. In that case the defendant claimed lands under water under a grant made by the State, pursuant to certain acts of the legislature. Before the defendant had constructed any improvements, the legislature passed a law providing that no pier might be built within 100 feet of another pier. The defendant constructed a pier upon the land granted to it, within 100 feet of a similar structure upon the adjoining property. The Court of Appeals held that the construction of such pier was in violation of the State law, and that the State might require its removal. From the opinion of the court, we quote the following:

> "The grant to Gore contained no words excluding the exercise by the State of governmental control of the waters above the land granted as a public highway, and if, in exercising this control, the grantee is restricted in the use of his property, it is not in contravention of the grant, but consistent with it, because the grant, by well settled words of construction was subject to the exercise of this right and attribute of sovereignty. We need

not inquire what the rights of a grantee would be in respect to piers and wharves, erected under the license implied from the grant before it had been revoked, or the State had, in the exercise of its discretion, made regulations upon the subject.

"The legislature, by chapter 763 of the Laws of 1857, entitled 'An act to establish bulkhead and pier lines for the port of New York,' established pier and bulkhead lines for the port and harbor of New York which included the premises granted to Gore. The second section is as follows: 'It shall not be lawful to fill in with earth or other solid material in the waters of said port beyond the bulkhead line, or line of solid filling hereby established, nor shall it be lawful to erect any structure exterior to the said bulkhead line, except the sea wall mentioned in the first section of the act, and piers which shall not exceed seventy feet in width respectively with intervening water spaces of at least 100 feet, nor shall it be lawful to extend such pier or piers beyond the exterior or pier line, nor beyond or outside of said sea wall.'

"When this act was passed no piers had been erected on the Gore grant, and so far as appears, there was unity of title as to the whole tract embraced therein. This act was a lawful exercise of legislative power, as a regulation for the benefit of commerce and navigation, and the owners of the Gore grant were bound to observe it, and in erecting piers to conform to its directions."

68 N. Y., at pp. 79-80.

See also,

> *Coffin vs. Scott*, 19 Weekly Dig., 413; aff'd. 102 N. Y., 730 (opinion printed as appendix to our brief upon the original argument).

The plaintiffs contend that a different rule is to be found in other cases decided by the Court of Appeals, for example, *Langdon vs. The Mayor*, 93 N. Y., 129, and *Williams vs. The Mayor*, 105 N. Y., 419. In these and similar cases it appeared that the lands granted *had been fully filled in*, and had thus ceased to be within the domain of the regulatory power over navigable waters. These decisions apply, for example, to the land of the plaintiffs east of Twelfth Avenue, which we admit neither the State nor the City has the power to disturb.

The plaintiffs also refer to the case of *People vs. Steeplechase Park Co.*, 218 N. Y., 459. It was there held that the State has the power to convey such title to the foreshore as will permit the grantee to erect structures which prevent the passage of the public. There is nothing in that case which is inconsistent with our contention in the case at bar. It did not involve the question of the State's regulatory power. It does not follow, from anything that was said in that case, that the grantee would not have been obliged to conform his improvement of the lands granted to any harbor lines which might have been established.

We do not claim that the plaintiffs did not acquire a fee. They acquired as great a title as an individual can have in lands under navigable waters. But something more than a mere conveyance of the lands is required before it can be argued that the State has surrendered its power of regulation.

In the case at bar, Judge Pound, referring to this line of cases, said:

> "If plaintiffs' lands easterly of the bulkhead line had been actually filled in they would no longer be lands under water and would be free from the regulatory power of the State (*First Construction Co. vs. State*, 221 N. Y., 295), but so long as they remained under water they were subject to the sovereign power of the State to regulate their use for purposes of navigation. * * *
>
> "Much that has been said in the cases as to the absolute and uncontrolled power of the State to grant the navigable waters for private purposes as it may grant the dry land it owns is *dictum* (*People vs. Steeplechase Park Co.*, 218 N. Y., 459; *Langdon vs. Mayor*, 93 N. Y., 129), and in conflict with rules laid down in other well-considered cases which hold that the so-called *jus privatum*, or absolute ownership of lands under navigable waters, together with the exclusive privilege in the waters themselves, which attached to the English crown, resides in the people in their sovereign capacity and cannot be conveyed for private purposes (Citing cases)" 235 N. Y., at pages 361-362.

Under these decisions, it seems clear that the plaintiffs hold the property subject to the regulation of its use by the Secretary of War and the State authorities.

The regulation of the use of land under navigable waters ordinarily takes the form of establishing harbor lines, bulkhead lines to limit the extent of solid filling, and pier lines to limit the extent, width and location of piers.

As we have stated, the Secretary of War, acting under the authority of Congress, in 1890, established a bulkhead line 150 feet west of the westerly side of Twelfth Avenue, and approximately 250 feet west of the present line of solid fill. The plaintiffs concede that they are bound by this line and may not fill beyond it. This concession is based upon numerous decisions of this court, some of which are

*Scranton vs. Wheeler*, 179 U. S., 141, 163;
*Cummings vs. Chicago*, 188 U. S., 410;
*Calumet Grain Co. vs. Chicago*, 188 U. S., 431;
*Phila. Co. vs. Stimson*, 223 U. S., 605;
*Greenleaf Lumber Co. vs. Garrison*, 237 U. S., 251.

The courts of New York have restrained the City and the other defendants from interfering with the plaintiffs' rights inshore of the bulkhead line (R., pp. 551-552), and the defendants do not seek to review such determination. It thus appears that the controversy in the present case deals entirely with the land under water outshore of the bulkhead line.

The only regulation by the Federal government outshore of the bulkhead line is the pierhead line established by the Secretary of War, a considerable distance beyond the lands in controversy (R., p. 182, maps, pp. 529, 531). This is a line limiting the outer extremity of the piers to be built. The plaintiffs base no complaint upon the establishment of such line.

Plaintiffs' sole ground of complaint is the establishment, by the State authorities, inshore of the Federal pier line, of limitations respecting the

width and location of piers. The plan adopted by the State provides for piers at the foots of the streets, and for slips between the piers. The plaintiffs complain that they are thus deprived of their property, and that their contract rights have been impaired.

This court has held that a State has the power to restrict the building of piers and wharves where the Federal government has made no restrictions, or where the State's regulations do not conflict with those of the United States.

*Montgomery vs. Portland*, 190 U. S., 89.

Manifestly, there must be some regulation of the width of piers and the distances between them. When the Secretary of War established the pier line 700 feet outshore of the bulkhead line, this was done in order to permit the building of long piers and the mooring of vessels at the sides of the piers. If there were no restriction with respect to the location or width of piers, the entire space between the bulkhead and pierhead lines might be covered by wharf structures, thus effectually preventing the use of any part of them other than their outshore ends. The determination of the questions respecting the location of piers and the spaces between them has been left to the State, and the State has provided the necessary regulations.

The uniform custom throughout the harbor of New York has been for the Secretary of War to establish bulkhead and pierhead lines, and for the State to provide regulations respecting the location of piers between the two lines laid down by the Secretary. The latter is more or less a matter of local concern, while the laying down of the major lines (the bulkhead and pierhead lines) determines

the width of the Channel and is of more general concern.

It has also been the uniform custom in the harbor of New York to place piers at the foots of streets which intersect the shore line. What more natural location could there be?

The plaintiffs admit that they are bound by the lines laid down by Congress through the instrumentality of the Secretary of War. Why then are they not equally bound by the regulations of the State of New York through the instrumentality of the officials selected by its legislature?

The regulatory acts of the State affect all. All must use their property in the manner provided by the regulatory authority. All land under navigable water is subject to regulation with respect to the manner of its improvement. This is absolutely necessary in order that proper provision may be made for navigation. If one owner gains and another loses by the exercise of the State's regulatory power, this is merely incidental. All general regulations similarly help one and hurt another. The only proper consideration in matters of this kind is for the needs of the general public. The State's power, within its proper sphere, must be as great as that of the Federal government. True, the State may not permit improvement where the Federal government forbids. But the State may further restrict within the area as to which the Federal government has manifested its indifference. No one may extend a pier beyond the Federal pierhead line. But the State may say that, within such line, the piers must be so far apart or only in certain specified locations.

The lands in question, lying as they do beneath the waters of the Hudson River, are subject to the public right of navigation. The plaintiffs, of

course, have the right to bring in vessels and unload them upon their filled land. The lessees of the adjacent piers, likewise, have the right to bring in vessels and moor them alongside of these piers. Because of the action of the public authorities, the lands in question may not be filled, but must remain under water. It necessarily follows that they may be navigated by the public, by the plaintiffs, and by the defendant.

It has often been stated that the State may grant land under water in such a manner and under such circumstances that the grantee becomes a proprietor to the same extent as a proprietor of upland. This may be true where the land under water granted consists of shallows unsuitable for general navigation, and where the grantee has actually filled in the lands and made upland of them. This is the situation with respect to so much of the lands granted to plantiffs' predecessors as lie east of Twelfth Avenue. They have been filled in and are now as much part of the upland of Manhattan Island as any other portion of that Island. No one questions this. It may be conceded, as a general proposition, that where an owner has lawfully filled in land under water with the consent of both the Federal and State authorities it become upland, free from the trust subject to which land under water is held, and free from the regulatory power of the State over navigable waters. Judge Pound recognized this principle in the case at bar, when he said:

> "If plaintiffs' lands easterly of the bulkhead line had been actually filled in, they would no longer be lands under water, and would be free from the regulatory power of the State."
> 235 N. Y., at pp. 361, 362.

The consent of the Federal and State authorities is evidenced by the establishment of bulkhead lines, lines to which solid filling is permitted. By the establishment of such lines, the authorities define the limits of a navigable waterway. In permitting the conversion into upland of land under water inshore of a bulkhead line, navigation is not interfered with nor obstructed. On the contrary, it is facilitated. Modern commerce could not be accommodated in a harbor which remained in its natural condition, with sloping beaches and mud flats along its edge. By permitting filling out to a reasonable depth of water vessels are enabled to moor alongside the shore or at piers extending therefrom.

Outshore of the bulkhead line, however, we are in navigable waters. Here, every private right is subordinate to the rights of the public. All ownership is subject to public regulation. No right, whether of ownership or otherwise, can be granted which will prevent the full and free exercise of the regulatory power of Congress and of the State.

This is all that the courts have held in the case at bar. With respect to the filled lands inshore of the bulkhead line, it is conceded that the regulatory power no longer exists, for they are no longer part of the navigable waters of the River. They have become upland. Outshore of the bulkhead line, however, no structure may be placed without the approval of the authorities. The Secretary of War has limited the distance to which piers may be extended; the State has prescribed their location and width. This is neither a taking of property nor an infringement of the plaintiffs' granted rights. It is an exercise of sovereign power to which all land under navigable waters is subject.

*Prosser vs. Northern Pacific R. Co.*, 152 U. S., 59;
*Greenleaf Johnson Co. vs. Garrison*, 237 U. S., 251.

No property of the plaintiffs has been taken. Their grants from the City have not been impaired. The New York courts have held that these grants do not convey as unqualified a title as would be conveyed by a grant of upland. The lands granted have been held to be subject to the regulatory power of the Federal and State governments. As we shall show under Point II, this doctrine is not at all at variance with the decisions of this court, and, even if it were, it is sufficiently supported by reason to survive the test applied in cases of contract impairment.

"In such circumstances, although we construe the constitution for ourselves and determine the existence or non-existence of the contract set up and whether its obligation has been impaired by the State enactment, *Douglas vs. Kentucky*, 168 U. S., 488, 502, 'the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt,' a principle reinforced by the later cases."

*Tampa Water Works vs. Tampa*, 199 U. S., 241, 243-244.

"Although we all agree that in this class of cases it is our duty to see that parties are not deprived of their constitutional rights under the guise of construction, still the mere fact that without the State decision we might have

hesitated is not enough to lead us to overrule that decision upon a fairly doubtful point."

*Southern Wisconsin Ry. vs. Madison*, 240 U. S., 457, 461;
*Milwaukee Elec. Ry. vs. Milwaukee*, 252 U. S., 100, 103.

Upon the prior argument, there was some discussion of the following statements in the opinions of the Court of Appeals:

"The establishment of the bulkhead line does not conflict with the right of the City in the execution of an authorized plan of harbor improvement to construct slips between the piers, but the plan of the sovereign may not be carried out without re-acquiring the title which it has authorized the City to convey to private owners."

235 N. Y., at p. 363.

" * * * The title of relators to lands actually under water is subject to the rights of the City to improve the same for the purposes of navigation but that the City must reacquire the property rights in the land under water which it has conveyed before it can carry out its plans for such improvement."

235 N. Y., at p. 366.

These statements are not in any manner inconsistent with the determination of the court to the effect that the City had not violated any of the righs of the plantiffs. The court held, in *Matter of Appleby vs. Delaney* (No. 16 in this court) that the attempt of the State authorities in 1916 to move back the bulkhead line was futile. What the court

had in mind in making the above quoted statements is that, if the City desired to carry out its plan of moving back the bulkhead line and building a marginal wharf, as shown by the map opposite page 58 in the record in No. 16, it would have to exercise the power of eminent domain. Furthermore, if the City is itself to construct and utilize the bulkhead and marginal wharf at the new location, it will have to pay the plaintiffs for the extinguishment of their bulkhead rights.

Another case in which the City might be required to compensate the plaintiffs is illustrated by the map opposite page 62 in the record in No. 16. This plan shows a proposed pier in what is now the slip or basin between West 40th Street, and West 41st Street. Such pier, if constructed by the City, would in part occupy the lands granted to the plaintiffs. This would clearly constitute a taking of the plaintiffs' lands and could be justified only by the exercise of the power of eminent domain.

On the other hand, merely navigating vessels over what is and must remain land under water, and dredging navigable waters for the benefit of commerce, do not amount to an appropriation.

## POINT II.

**Questions concerning the rights of grantees of lands under navigable waters are purely local; moreover, the doctrine of the New York courts is in accordance with the decisions of this court in similar cases.**

*Martin vs. Waddell*, 16 Pet., 367;
*Shively vs. Bowlby*, 152 U. S., 1 (see pp. 20 to 21 where the law of New York is discussed).

In the last named case the court stated:

> "The later judgments of this court clearly establish that the title and rights of riprarian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution."
>
> 152 U. S., at p. 40.

> "Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and control of them are vested in the sovereign for the benefit of the whole people."
>
> 152 U. S., at p. 57.

See

*Philadelphia Co. vs. Stimson*, 223 U. S., 605, at p. 632.

In the recent case of *Port of Seattle vs. Oregon R. R. Co.*, 255 U. S., 56, it was held that questions respecting the extent of the rights granted in conveyances by a State either of lands abutting upon navigable waters or of tide lands (lands under water) are wholly matters of local law. The court stated among other things:

> "The proprietary right of the State over navigable waters and of the soil thereunder is

> neither exhausted nor impaired by making a sale of a tract of tide land, be it the parcel nearest the upland or some other."
>
> 255 U. S., p. 65.

The plaintiffs refer to the case of *Packer vs. Bird*, 137 U. S., 661. That case dealt with a grant made by the Federal government, and it was there held that the courts of the United States will construe such a grant without reference to the rules of construction adopted by the States. It was also held that whatever incidents or rights attach to the ownership of propery conveyed by the government may be determined by the State law, subject to the condition that their rules do not impair the efficacy of the Federal grant.

In *Sanitary District vs. United States*, 266 U. S., 405, the court dealt with the question of the right of a political subdivision of the State of Illinois to divert water from Lake Michigan by means of a canal uniting the waters of the Lake with the Illinois River. It was contended that the State had this right under an act of Congress passed in 1827. With respect to this contention the court wrote:

> "But the defendant says that the United States has given its assent to all that has been done and that it is estopped to take the position that it now takes. A State cannot estop itself by grant or contract from the exercise of the police power. *Texas & New Orleans R. R. Co. vs. Miller*, 221 U. S., 408, 414; *Atlantic Coast Line R. R. Co. vs. Goldsboro*, 232 U. S., 548, 558; *Denver & Rio Grande R. R. Co. vs. Denver*, 250 U. S., 241, 244. It would seem a strong thing to say that the United States is

subject to narrower restrictions in matters of national and international concern."

266 U. S., at p. 427.

In *Greenleaf Johnson Lumber Co. vs. Garrison*, 237 U. S., 251, it appeared that the complainant had constructed an improvement in the waters of the Elizabeth River consisting of two fills, with the outer extremities connected, thus making a three sided wharf with a log pond in the centre. This improvement was entirely inshore of a harbor line adopted by the Secretary of War in 1890. In 1911 the Secretary established a new line farther inshore, cutting off about 200 feet of complainant's structure. This court held that the complainant was obliged to comply with the new line and remove the portions of his wharf extending beyond it, and that the action of the public authorities was not a taking of property, but the lawful exercise of a governmental power for the common good.

In *Lewis Blue Point Co. vs. Briggs*, 229 U. S., 82, it was held that an owner of land under water had no right to complain of the action of the public authorities in dredging a channel, although it destroyed his oyster plantation. The court, among other things, stated:

"That case and the later one cited fail to recognize the qualified nature of the title which a private owner may have in the lands lying under navigable waters. If the public right of navigation is the dominant right, and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use

the bed of the water for every purpose which is in aid of navigation. This right to control, improve, and regulate the navigation of such waters is one of the greatest of the powers delegated to the United States by the power to regulate commerce. Whatever power the several States had before the Union was formed, over the navigable waters within their several jurisdictions, has been delegated to the Congress, in which, therefore, is centered all of the governmental power over the subject, restricted only by such limitations as are found in other clauses of the Constitution.

"By necessary implication from the dominant right of navigation, title to such submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands, or to use them for any structure which the interest of navigation, in its judgment, may require. The plaintiff in error has, therefore, no such private property right which, when taken, or incidentally destroyed by the dredging of a deep-water channel across it, entitles him to demand compensation as a condition."

229 U. S., pp. 87-88.

The courts of New York have construed the plaintiffs' grants in accordance with the foregoing opinions of this court, and have held them to be subject to the State's regulatory or police power, to be exercised for the common good. They have applied to the ownership of land under water a limitation of the same character as that applied by this court with respect to the powers of Congress. The exercise of this power by Congress does not preclude the exercise of similar power by the State

(*Montgomery vs. Portland*, 190 U. S., 89). It has accordingly been held that ownership of land under water is subject to the exercise of the regulatory powers of both the Federal and State governments.

The decision in the case at bar is a mere reiteration of the doctrine set forth by this court when, in *Shively vs. Bowlby*, it stated the law of New York as follows:

> "The owner of the upland has no right to wharf out without legislative authority; and titles granted in lands under tide water are subject to the right of the State to establish harbor lines. *People vs. Vanderbilt*, 26 N. Y., 287, and 28 N. Y., 396; *People vs. N. Y. & S. I. Ferry Co.*, 68 N. Y., 71."
>
> 152 U. S., p. 21.

## POINT III.

**The piers and sheds at the foot of 39th, 40th and 41st Streets are lawfully maintained.**

Plaintiffs contend that the piers in question are in the beds of public streets and constitute a diversion of the same from street uses. This contention overlooks the fact that, under regulations both of the Federal and State governments, there may be no solid filling beyond a point about 150 feet west of Twelfth Avenue. Where there can be no solid filling, obviously there can be no public street.

As we have heretofore stated, the scheme of development contemplated by the City's grants to the plaintiffs' predecessors was frustrated by the establishment of the bulkhead line. This prevented

further filling. It limited the plaintiffs' right to gain land from the River, and also relieved them from the performance of the consideration, namely, the building and perpetual maintenance of the streets beyond the bulkhead line.

Plaintiffs complain that we have built piers instead of streets. Any structure except a pier would be a violation of governmental regulations, a purpresture, a nuisance and a crime against the United States.

> *Peo. vs. Vanderbilt*, 26 N. Y., 287; 28 N. Y., 396;
> *Philadelphia Co. vs. Stimson*, 223 U. S., 605, 622.

The construction of piers between the bulkhead and pierhead lines being lawful, no great hardship was visited upon the plaintiffs when the City, at its own cost, built these piers. As the plaintiffs may not fill in the land under water beyond the bulkhead line, there is no hardship in permitting the City to float vessels over it and moor the vessels at its piers. The plaintiffs may also navigate these waters, and have a right of access over them to their land and *vice versa*.

In other words, the best has been made of the situation resulting from the limitation of the right to fill. The unfilled lands are being utilized in the only manner possible; and the plaintiffs have the same right along the outshore edge of the filled lands as they would have had along the westerly side of Thirteenth Avenue, if that avenue had been built.

## POINT IV.

**The lands under water in controversy may be dredged to facilitate navigation.**

Lands under navigable waters may be dredged, to facilitate navigation, without any liability to the owner of the fee of the underlying lands.

*Lewis Blue Point Co. vs. Briggs*, 198 N. Y., 287; aff'd. 229 U. S., 82;
*Tempel vs. United States*, 248 U. S., 121.

## POINT V.

**The affirmance by the Court of Appeals does not carry with it any approval of the conclusions of law made by the Appellate Division.**

Throughout the entire brief submitted by the plaintiffs in error upon the prior argument, great emphasis is laid upon the fact that the Appellate Division made certain conclusions of law with respect to the legal effect of the City grants and the rights of the plaintiffs thereunder. It is repeatedly stated that the Court of Appeals, by affirming the judgment, adopted these conclusions, that they are "the law of the case," and amount virtually to an adjudication which required the court to grant the relief asked for in *Appleby vs. Delancy* (to be argued herewith as No. 16).

All this is based upon a wholly erroneous assumption with respect to the powers, jurisdiction and practice of the New York Court of Appeals. The fundamental defect in this process of reasoning lies in the fallacy of the proposition that an

affirmance by the Court of Appeals amounts to an approval of the conclusions of the court below.

The practice in equity in New York requires the parties to submit to the court "requests to find" propositions of fact and law, which the court is required to pass upon (Civil Practice Act, Section 439). The decision of the court "must state separately the facts found and conclusions of law, and direct the judgment to be entered thereon" (*Idem*, Sec. 440).

Prior to a recent amendment hereinafter noted, no appellate court could change the "decision" of the court below, consisting of the findings of fact and conclusions of law.

> *New York Bank Note Co. vs. Hamilton Bank Note Co.*, 180 N. Y., 280; pp. 290-291, 297.

The appellate court could, of course, affirm, reverse or modify the *judgment*. But its power did not extend to a modification of the *decision*. If it concluded that the judgment was correct, despite errors in the decision, it could still affirm by disregarding the errors.

> *Knox vs. Metropolitan R. Co.*, 58 Hun, 517; 523-4;
> *London vs. Martin*, 79 Hun, 229.
> *Wetmore vs. Bruce*, 118 N. Y., 319; 323-324;
> *Ostrander vs. Hart*, 130 N. Y., 406, 413;
> *Appleton vs. City of New York*, 219 N. Y., 150.

If the errors in the decision were of so serious a nature that they could not be disregarded, the

appellate court would have to reverse the judgment and grant a new trial.

*N. Y. Bank Note Co. vs. Hamilton Bank Note Co.*, 180 N. Y., at pp. 290-291.

By a recent amendment of the applicable statutes, the Appellate Division has been given power to make a new decision, new findings of fact, and new conclusions of law.

*Lamport vs. Smedley*, 213 N. Y., 82.

As a result of this change in practice, it has been held that, where a decision or a finding is not changed by the Appellate Division, that court must be considered to have approved such decision or finding.

*Rives vs. Bartlett*, 215 N. Y., 33, 38-39.
*Beatty vs. Guggenheim Exploration Co.*, 223 N. Y., 294, 303.

The Court of Appeals, however, has never been given the power to change a decision or finding of the lower court. It still has power to affirm, modify or reverse a judgment. But with respect to the findings, it must take them as they are. If it reverses the judgment, of course the decision falls. But, as we have stated, the Court of Appeals may disregard erroneous findings and still affirm the judgment. This it has frequently done. For example, in *Ostrander vs. Hart*, 130 N. Y., 406, the court, at page 413, expressed its disapproval of the conclusions of law made by the court below, as set forth at page 409, but, notwithstanding this disapproval, affirmed the judgment.

In *Appleton vs. The City of New York*, 219 N. Y., 150, the court expressed its disapproval of many of the findings of the court below and yet affirmed the judgment. In the last named case, the plaintiff, fearful of the effect of the affirmance of the judgment upon future litigation, moved for the amendment of the order of the court in such a manner as to specifically reverse the findings which the court had disapproved. The court declined to do this, but, in order to allay the plaintiff's fears, granted the motion to amend "to the extent of inserting therein a statement to the effect that the judgment of the Appellate Division is affirmed solely upon the grounds set forth in the opinion of this court" (219 N. Y., 681). This, of course, was merely a statement of the legal effect of the affirmance.

The number of cases in which the Court of Appeals has disregarded erroneous conclusions of law, when affirming without opinion, is doubtless very great.

Having no power to change any finding or conclusion or to deal specifically with a finding or conclusion in any manner, the Court of Appeals must, when it decides to affirm, either disregard erroneous findings and conclusions altogether, or indicate its disapproval in its opinion. There is no case in the whole series of New York reports in which the Court of Appeals has ever changed a finding or conclusion of law, made a new finding or conclusion, or even specifically reversed one. The most it has ever done is to indicate in its opinion its views with respect to the findings and conclusions.

The clearest explanation of this feature of New York practice is contained in the opinion of the Appellate Division in *Erie R. R. vs. International Ry. Co.*, 209 App. Div., 380, affirmed 239 N. Y.,

598. There it was contended that a conclusion of law contained in a prior judgment affirmed by the Court of Appeals constituted a binding adjudication. The court stated:

> "The legal conclusions reached by a court in making a decision, even in an opinion, are not necessarily adopted and approved on appeal where the decision is affirmed without opinion. Only the right of the party to recover is decided and the court is responsible only for that, not for the reasons given nor opinions theretofore expressed (*Rogers vs. Decker*, 131 N. Y., 490; *Cherrington vs. Burchell*, 147 App. Div., 16; *Simpson vs. New York Rubber Co.*, 80 Hun, 415, 418; 15 C. J., 942). An affirmance may be based on a different theory or on different grounds or on any sufficient ground found in the evidence (4 C. J., 662).
>
> "Courts are required to pass on requests to find when submitted by either party. The statement must be in the form of distinct propositions of law or of fact, or both, separately stated and numbered (Civ. Prac. Act, Sec. 439; formerly Code Civ. Proc., Sec. 1023). These are made for the protection of the court and parties, and to make the case readily reviewable (38 Cyc., 1953). Findings of fact once decided in a matter of litigation between parties and affirmed, become conclusive (Id., 1987). *If the facts warranted a judgment in parties' favor, erroneous conclusions of law are of little importance for an appellate court will ordinarily affirm without regard to erroneous or unnecessary conclusions of law.* It is not strictly necessary that such conclusions of law be made in any particular form, a gen-

eral conclusion that a party recover or have judgment being sufficient (Id., 1978). In *Colonial City T. Co. vs. Kingston R. R. Co.* (154 N. Y., 493, 495) it is said: 'A judicial opinion, like evidence, is only binding so far as it is relevant.' No particular significance is attached to the fact that the parties argued on the former appeal that the 5th conclusion of law would be highly prejudicial to defendant in the future" (Italics ours).

209 App. Div., p. 384.

In the case at bar, the Court of Appeals, in its opinion, plainly expressed its disapproval of the new conclusions made by the Appellate Division, numbered 26 and 27 (R., p. 550). Those numbered 28, 29 and 30, which are so often referred to by the plaintiffs, are wholly irrelevant to the issues in *this action* and, indeed, are based upon facts not in evidence. *In this action*, the plantiffs do not seek to enforce any alleged right to fill in, and the fact of the establishment of a new bulkhead line in 1916 is not before the court. The record shows that, upon a supplemental hearing, the counsel for the City offered in evidence the proceedings relating to the new bulkhead line of 1916 (R., pp. 285-288). The court reserved decision on the admissability of these matters, and, in its opinion, ruled against their admissability (R., p. 364). It is only in *Appleby vs. Delaney* (No. 16 in this court) that the facts with reference to the 1916 bulkhead line are formally before the court. This, of course, furnishes an additional reason why the Court of Appeals, in this case, disregarded the conclusions of the Appellate Division.

When the plaintiffs seek to take advantage of these conclusions as *res judicata* in No. 16 (*Ap-*

*pleby vs. Delancy*), there is the additional objection that they were not pleaded as such. The petition in the mandamus proceeding (No. 16) contains no reference to any of the proceedings in this action (No. 15).

The Court of Appeals, in deciding this action (No. 15) properly disregarded the new conclusions of law made by the Appellate Division, except to the extent that it expressed its views in its opinion. When it came to decide the mandamus proceeding (No. 16), it expressed its views on the subject covered by these conclusions in no uncertain terms; holding that the new bulkhead line was not binding upon the plaintiffs, but that they could not do any further filling without the consent of the common council.

**The judgment should be affirmed.**

New York, January 22, 1926.

Respectfully submitted,

CHARLES J. NEHRBAS,
Counsel for defendant in error.

(3166 A)

# SUPREME COURT OF THE UNITED STATES.

No. 16.—October Term, 1925.

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|---|---|
| Edgar S. Appleby and John S. Appleby, Plaintiffs in Error, *vs.* John T. Delaney, as Commissioner of Docks of the City of New York. | In Error to the Supreme Court of the State of New York. |

[June 1, 1926.]

This is a writ of error to a judgment of the Supreme Court of New York in a suit for mandamus entered by direction of the Court of Appeals of New York, in a case involving the same deeds of water lots between 39th and 41st Streets on the east side of North or Hudson River, which have been under consideration in the case just decided. The petition of the Applebys as relators in this case shows that they have performed all the covenants they had to perform under the deeds; that neither they nor the predecessors in title had ever been required to build or erect piers, wharves or bulkheads, referred to in the deeds; that under the Act of 1871, a Department of Docks was created, with general supervision and control of the dock property of the city, that it was given authority, with the approval of the Sinking Fund trustees of the city, to make a plan or plans for the improvement of the harbor, to lay out wharves, and to condemn such vested property interests of individuals as might interfere with such plans and make compensation therefor; that in June, 1891, the city instituted a condemnation proceeding to acquire the Appleby property, but that in 1914 it discontinued it and since that has never attempted to acquire title to the premises; that a plan was adopted in 1916 by the Dock Commission for harbor improvement, with the approval of the Sinking Fund trustees, for a marginal wharf to be 250 feet wide, to include all of 12th Avenue, and so much of the Appleby property as lay west of 12th Avenue, and within a distance of 100 feet westerly therefrom, which would interfere with

relators filling their lots; that in December, 1919, the Applebys made application to the Commissioner of Docks to begin and continue the filling of the two lots of the Applebys within the government bulkhead line as permitted by their deeds; that the Commissioner of Docks, in answer to this application, wrote as follows:

"January 31, 1920.

"Replying to your letter of the 26th instant, I beg to advise you that the application of Edgar S. Appleby and John S. Appleby for permission to construct either a platform between West 39th Street and West 41st Streets, North River, or a concrete wall on platform construction with sheet piling along the inner side to retain filling is hereby formally denied on account of the fact that the proposed construction is not in accordance with the new plan."

Thereupon this suit was brought by the Appleby's against the Dock Commissioner to compel the issuing of the necessary permit. This was denied by the Supreme Court in special term. The denial was reversed in the Supreme Court, Appellate Division, and that reversal was in turn reversed by the Court of Appeals in an opinion as follows:

"Relators seek to compel the commissioner of docks to approve permits for the filling in of lands under water.

"The facts herein are substantially the same as in Appleby *v.* City of New York, decided herewith, with this difference: The city established a new bulkhead line in 1916, which crosses the premises granted between Twelfth and Thirteenth avenues. It was held in the action that the rights of the relators are not limited by this bulkhead line but only by the bulkhead line established by the secretary of war. The court below decided herein that a writ of peremptory mandamus should issue unless condemnation proceedings were instituted to acquire relators' property and property rights within such line. (199 App. Div. 552.)

"We held in the action that the title of relators to lands actually under water is subject to the rights of the city to improve the same for the purposes of navigation but that the city must re-acquire the property right in the land under water which it has conveyed before it can carry out its plans for such improvement.

"This application should not, however, be granted. Section 15 of title 4 of the sinking fund ordinance of 1844, referred to in the opinion in the action, provides:

"'No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity therewith, without permission to do so is first had and obtained from the common council.'

"The water grants under which relators hold title also provide:

"'And it is hereby further covenanted and agreed, by and between the parties to these presents, and the true intent and meaning hereof is that the said party of the second part, his heirs and assigns will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had and obtained from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part or their successors or assigns first had for that purpose.'

"In Duryea *v.* Mayor, etc. (62 N. Y. 592), it was said that a similar clause did not limit the right of the owners to fill the space between the streets, but on a subsequent appeal (Duryea *v.* Mayor, etc., 96 N. Y. 477), it was said that the provisions of the sinking fund ordinance had not been called to the court's attention on the first appeal and it was held that the council had given its consent. We are free to interpret the clause according to its meaning. To construe the ordinance and the grants as permitting the filling of the land between the streets at the will of the grantee and as prohibiting the building of the wharves and streets without the consent of the common council would be unreasonable. The lands are thus held subject to the conditions of the grant and may not be filled in without the approval of the city authorities. The power to grant permission to construct bulkheads or piers and to make land in conformity with relators' grants implies the right to withhold such permission."

The Sinking Fund ordinance, referred to in the opinion of the Court of Appeals, does not appear in the record. The Court of Appeals, however, took judicial notice of it, and the following statement with respect to it is taken from the opinion of that court in the case of *Duryea* v. *The Mayor*, 96 N. Y. 477, 485, 486:

"These ordinances adopted in 1844 provide, among other things, that the lands under water on the shores of the island of New York, belonging to that city under its several charters, might be sold and conveyed by such city to parties desiring to purchase the same, giving priority to the owner of the adjacent upland upon certain terms and conditions therein mentioned."

Section 15 reads:

"No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity

thereto without permission so to do is first had and obtained from the common council, and the grantee shall be bound to make such lands, piers and bulkheads at such times and in such manner as the common council shall direct under penalty of forfeiture of such grant for noncompliance with such terms of the common council.

"These ordinances were recognized and approved by the state legislature in ch. 225 of the Laws of 1845, and were attempted thereby to be placed beyond the power of the local authorities of the city to limit or amend without the previous consent of the Legislature."

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

The relators base their writ upon the alleged impairment of their contract rights contained in the grant and covenants of their deeds by the plan adopted in 1916 under the Act of 1871 by the Dock Department, and approved by the Sinking Fund trustees, the execution of which the Dock Commissioner is enforcing by a formal refusal to grant permission as requested by the relators to fill up their lots. The authority of the Dock Commissioner and the Sinking Fund trustees under the Act of 1871 is such as to make the plan and the refusal equivalent to a statute of the State, and assuming that it is in conflict with the grant and covenants of relators' deeds, it is a law of the State impairing a contract obligation under section 10, Article I, of the Federal Constitution. *New Orleans Waterworks Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18; *Williams* v. *Bruffy*, 96 U. S. 176, 183; *Walla Walla City* v. *Walla Walla Water Works Company*, 172 U. S. 1; *Mercantile Trust & Deposit Company* v. *Columbus*, 203 U. S. 311; *Zucht* v. *King*, 260 U. S. 174. We have jurisdiction of the writ of error under section 237 of the Judicial Code.

The question in this case then is whether the deeds before us, construed in connection with the Sinking Fund ordinance of 1844, gave to the plaintiffs the right to fill in the lots without the consent of the city. Each deed described the land conveyed as follows: "All that certain water lot or vacant ground and soil under water *to be made land and gained out* of the Hudson or North River or harbor of New York, and bounded, etc., together with all and singular the privileges, advantages, heredita-

ments and appurtenances to the same belonging or in any wise appertaining." The grants were in fee simple. The grantees respectively covenanted that they would, upon the request of the city, build bulkheads, wharves, streets and avenues to form part of 12th and 13th Avenues, and 39th, 40th and 41st Streets, which were within the general description of the premises conveyed. These were excepted therefrom for public streets. The grantees agreed to pay the taxes on the lots lying between the streets. There was a covenant that they would not build the wharves, bulkheads, avenues or streets previously mentioned until permission had been given by the city. The city covenanted that the grantees might have wharfage on the westerly side of the granted premises fronting on the Hudson River, excepting at the westerly end of the cross streets, which was reserved for the city.

In a deed of a similar water lot on the east side of the city, with exactly the same covenants, the question arose in the case of *Duryea* v. *The Mayor, etc.*, 62 N. Y. 592, 596, whether the covenants with respect to filling the streets applied to the filling of the water lots between the streets, and it was held that they did not. The Court said, at page 596:

"The only covenant in the deed for making lands applies exclusively to the building of streets, wharves, etc., and there is not a word pertaining to the intermediate spaces."

In the same case reported in 96 N. Y. 477, the Sinking Fund ordinance, not referred to in the first decision, was pressed upon the Court to change its conclusion in the first hearing and to hold that the city had the absolute right, by reason of the ordinance, to forbid the filling of the land conveyed. As to that, the Court said:

"It may well be doubted whether the construction formerly given by this Court to the covenants contained in the deed should not also be deemed applicable to the provision of the sinking fund ordinance. The object of this provision was not to cause any interest in the land conveyed to be retained by the grantor, or to postpone the period of enjoyment of its owners, or increase the security of the public creditors, but was obviously designed to enable the grantor to shield itself from the burden of caring for and maintaining the piers, wharves and streets until such time as it should deem the assumption thereof profitable and expedient, and to fix the time and manner of erecting those structures with reference to the introduction therein of water, gas, sewer pipes

and other necessary conveniences which naturally fell under the supervision and control of the city authorities. The accomplishment of this object would in no way be materially interfered with by allowing the grantees to proceed with their contemplated work of redeeming their lands from the water and realizing the benefits, which were the sole inducement to them, for its purchase."

It referred to the conduct of the City through all its departments for a period of upwards of twenty years in dealing with the ordinance and deeds like this as having affixed the interpretation claimed by the relators as the true intent and meaning of both. It said further:

"The rule by which this ordinance is to be construed is such as applies to the interpretation of the acts of other legislative bodies, and is that which shall best effectuate the intent of its authors. The reason and object of an act are to be regarded to arrive at its meaning, and while it is not competent to interpret that which has no need of interpretation, or to deny to clear and precise terms the sense which they naturally present, yet when such terms lead to manifest injustice and involve an absurdity, law and equity both require us to give such an effect to the language used as will accomplish the obvious intent of the legislature.

"The only lands expressly provided to be made by the ordinance are those constituting the piers, wharves, streets and avenues, and since it is unnecessary in order to give the clause in question an office to perform, to extend it to lands outside of such streets, and to create a right unconnected with those clearly intended to be granted, it is in accordance with settled rules of interpretation to limit the effect of general language to the accomplishment of the object undoubtedly intended. If it be held that the words 'make land in conformity thereto,' as used in the ordinance, apply only to the lands necessary to form the piers, bulkheads and streets, the defendant will not only be protected in all of the rights intended to be secured to it, but the grantee will receive the benefits of his purchase and the deed will be free from objection on account of the apparent repugnancy existing between the interests actually conveyed and those apparently reserved.

"It is quite inconceivable that parties should purchase land burdened with the condition that it should be enjoyed only by the permission of the grantor, and a construction having that effect, should only be adopted when no other is possible or sustainable."

After giving this construction to the deed and ordinance, the Court then examined the evidence and found that the common council had by its conduct consented to the filling in of the lots,

and because in its summing up the Court referred to the latter ground, it is insisted that its chief discussion and conclusion upon the construction of the ordinance and deed are not to be treated as authority. It should be noted that the construction of the deed by the Court in the *Duryea* case upon this point was referred to approvingly as authority in *Mayor* v. *Law*, 125 N. Y. 380, 381, where, citing the *Duryea* case, the Court used this language with respect to a similar covenant:

"The grantee became the absolute owner of the land between the streets—the land granted, and (that) he could properly fill it whenever he choose, suiting his own pleasure as to the time and manner of doing it, but there was nothing in the grant binding him to fill it up."

The Court of Appeals in the present case disposed of the question we are discussing as follows:

"To construe the ordinance and the grants as permitting the filling of the land between the streets at the will of the grantee, and prohibiting the building of the wharves and streets, without the consent of the common council would be unreasonable."

We can not agree with this. We think the reasons advanced by that Court in the second *Duryea* case to sustain the opposite construction of the deed and ordinance are much more persuasive. It has added force when it appears from the opinion in the *Duryea* case and the conclusion of the Appellate Division in this case that such construction of such deeds and the ordinance has become a rule of property for more than fifty years. It is not reasonable to suppose that the grantees would pay $12,000 in 1852 and 1853, and leave to the city authorities the absolute right completely to nullify the chief consideration for seeking this property in making dry land, or that the parties then took that view of the transaction. Including the down payment, the grantees or their successors have paid the taxes assessed by the city for seventy-five years, which have evidently amounted to much more than $70,000. It does not seem fair to us, after these taxes have been paid for sixty years, in the confidence justified by the decision of the highest state court, that there was the full right to fill in at the pleasure of the grantees and without the consent of the city, now to hold that all this expenditure may go for naught at the pleasure of the city.

If the Sinking Fund ordinance is to be applied at all to the filling in of the land in the limits within the deeds, it should in

our judgment be regarded as a mere police requirement of a permit incident to the filling and to supervising its execution by regulation as to time and method, so that it should not disturb the public order. Had the refusal of the Commissioner of Docks, charged with the police regulation as to the docks, taken this form, an application for mandamus might well have been denied, because only an effort to control the police discretion of the public authorities, but the refusal to permit the filling to begin is not put on any such ground. It is denied because the city has a different plan, which does not permit the filling at all. This is an assertion of the right of the city absolutely to prevent the filling which is an impairment of the obligation of the contract, made by the city with these plaintiffs, in violation of the Constitution of the United States.

The judgment of the Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*